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1897-1901
CRIMINAL

VOLUME I



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NOTE.

This volume contains all the extant criminal rulings of the Judicial Commissioner of Upper Burma published between the years 1897 and 1901. The arrangement is the same as that of the volume for the years 1892—96. It is requested that in future, when rulings are cited, the page of this compilation, not the number in the original series, may be quoted.

In places where obsolete enactments have been quoted, references to the enactments now in force have been entered. Many references have been printed as footnotes instead of in the body of the judgments. In other respects the judgments are printed as delivered. Footnotes which do not appear in the original judgments are enclosed in brackets.

The undermentioned rulings, which appear to be obsolete or for other reasons ineffective, have been omitted:—

Upper Burma Rulings, 1897, Gambling, page 1.

Upper Burma Rulings, 1897, Towns Regulation, page 1.

Upper Burma Rulings, 1898, Excise, page 11.

Upper Burma Rulings, 1899, Criminal Procedure, page
103.

Upper Burma Rulings, 1901, Criminal Procedure, page
150.

LIST OF ABBREVIATIONS.

All.	...	...	...	Allahabad.
B. L. R.	...	...	...	Bengal Law Reports.
B. L. R.	...	...	...	Burma Law Reports.
Bom.	...	...	...	Bombay.
Bom. H. C. R.	...	...	...	Bombay High Court Reports.
Cal.	...	...	...	Calcutta.
I. L. R.	...	...	...	Indian Law Reports.
L. J. C. P.	...	...	...	Law Journal Common Pleas.
Mad.	...	...	...	Madras.
M. & W.	...	...	...	Meeson and Welsby. Mew's Digest, Volume 3, page 443.
N.-W. P. H. C. R.	...	...	...	North-West Provinces High Court Reports.
Page	...	...	...	Means a page of this volume when no other reference is specified.
P. J., L. B.	...	...	...	Printed Judgments, Lower Burma.
S. J., L. B.	...	...	..	Selected Judgments, Lower Burma.
U. B. R.	Upper Burma Rulings.
U. B. C. M.	Upper Burma Courts Manual.
W. R.	Weekly Reporter.

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UPPER BURMA RULINGS, 1897—1901.

Arms—19 (e).

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS v. NGA MYAT AUNG.

Arms Act, 19 (e).—Going armed in contravention of section 13.—Gun carried by a servant for a master who is legally entitled to possess and go armed.—Carrying arms does not necessarily equal going armed.

References.—I.L.R., 15 All., page 27; Stroud's Judicial Dictionary, page 296.

THE accused was convicted under section 19, clause (e), of the Arms Act in the following judgment:—

"Accused was told by his master to carry his shot-gun and six cartridges; while doing so, he was arrested by the police. He makes no defence except ignorance and pleads guilty.

"I find him guilty.

"2. I can make great allowance for his ignorance, as I thought till now that my servant could carry my gun for me to the gunsmith for repairs, etc., but it appears not to be the case, so I inflict a nominal fine of Rs. 1 (one) or simple imprisonment till rising of Court."

The charge was that accused was "carrying a gun, not having a license or being exempt from the necessity of having one." This charge was incorrect, for the offence made punishable by clause (e) of section 19 of the Arms Act is "going armed in contravention of the provisions of section 13;" and the provisions of section 13 are—

"No person shall go armed with any arms except under a license and to the extent and in the manner permitted thereby.

"Any person so going armed without a license or in contravention of its provisions may be disarmed by any Magistrate, police officer or other person empowered by the local Government in this behalf by name or by virtue of his office."

The interpretation clause in section 4 of the Act defines "arms" as including firearms. The offence was therefore complete if the accused was "going armed" and the sole question is whether, in carrying the gun of his master or employer, the accused was going armed.

The words "going armed" are not defined in the Act, and their meaning has to be considered with reference to the ordinary use of the language and the purpose and object of the enactment in which they occur.

"No doubt "to go armed" may be understood commonly to mean

"*Arma, armes*, in the common law signified anything that a man may be used as arms of that particular striketh or hurteth withal." Co. kind, and not merely to carry arms; Litt. 1610.

and this distinction appears in the conditions endorsed on License Form No. X, the second of which says: "It does not authorize the holder to go armed or to carry arms."

Criminal Revision

No. 1061.

1897.

March

9th,

1898.

Arms—19 (e).

QUEEN-EMPRESS
v.
NGA MYAT AUNG.

This license applies to the possession of firearms.

The accused's master was apparently at liberty both to possess arms and to go armed for purposes of sport, etc., and the accused himself was, it is understood, merely relieving his master of the burthen of carrying his own gun.

It must constantly happen that sportsmen on their way to and from the field hand over their guns to their servants to avoid unnecessary fatigue to themselves, and by doing so it does not appear that the servants should be considered as going armed when they have no control over the use of the gun so far as intended, and are simply bearers of the gun as a load. If the gun were taken to pieces before being handed to the servant, it would be difficult to hold that he could be armed with it, and the moral restriction of the servant's duty to make no use of the gun seems in effect to make the same difficulty when the gun is left complete. This is in accordance with the view taken by the High Court of Allahabad in the case of *Queen-Empress v. Alexander William*, which is quoted in *Queen-Empress v. Bhure*.*

There it was taken that the accused was carrying the gun for the purpose of getting it repaired, and, says the report referring to the first mentioned case, "the gun did not belong to the prisoner. The prisoner in that case was no doubt carrying the gun; he was not, however, carrying it as a weapon, but as a parcel, and was rightly considered not to have been going armed."

In dealing with this case, time has been given to the District Magistrate to make a reference to the local Government in order that, if required, the matter may be further argued; but the learned Government Prosecutor has intimated that, in the face of this ruling, no reference is wanted, and that he is unable to support the conviction.

At the same time it is pointed out that the police must of course do their duty in instances like the present and arrest persons who appear *prima facie* to be contravening the provisions of the Arms Act. If a servant carrying a gun is at a distance from his master, and is unprovided with any guarantee of the character in which he is acting, he is, of course, liable to arrest.

As was observed in the Allahabad case cited above—

"A man who is found going about with a pistol, gun, sword, or other weapon within the definition of 'arms' in section 4 of Act No. XI of 1878 must, in the absence of proof to the contrary, be presumed to be carrying it with the intention of using it, should an opportunity for using it arise, and unless he is licensed to carry the weapon and his not exceeding the terms of the license, may properly be convicted under section 19, clause (e), of the Act, as this man was."

If the language of the Act and the Rules under it were taken with absolute strictness, it may be doubted whether a conviction would not be covered even in such circumstances as the present. But such

* I. L. R., 15 All., 27.

Arms—19 (e).

rigid construction would be owing more to the inherent difficulties of language and concise expression than to the apparent intention of the legislature.

QUEEN-EMPRESS
v.
NGA MYAT AUNG.

The interpretation adopted above is consistent with common sense and puts the most reasonable meaning on the words which have been employed.

The conviction and sentence in this case are accordingly quashed.

Arms—19 (e).

Arms—19 (e).

Criminal Revision
No. 274.
1898.
April
30th.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. NGA THA BYAUNG.

Arms Act 19 (e)—Going armed in contravention of section 13.

The accused was convicted under section 19, clause (e), of the Arms Act in the following judgment:—

"The Police of Banmauk station received information of a theft and went after the accused, whom they found at Padingôn, and, on being searched, the *danyaung* now before the Court was found in the accused's *paso*.

"The accused says he, being a medicine-man, carried the *danyaung* to cut roots and herbs.

"The accused has no license to go armed.

"The accused was wanted for the commission of a theft for which he was been sentenced.

"*Finding.*—The Court of the first-class Magistrate finds that Nga Tha Byaung, son of Nga Tha Dwa of Kawda, is guilty of the offence specified in the charge, namely, that he went armed with a *danyaung* and has thereby committed an offence punishable under section 19 (e) of the Arms Act, and the Court directs that the said Nga Tha Byaung do suffer six months' rigorous imprisonment."

The District Magistrate considered the conviction was illegal on the ground that there was no evidence that the accused "*was going armed*" within the meaning of the section.

Held.—that from the circumstances disclosed it was clear that the accused had committed the offence of "going armed with a *dagger* in contravention of section 13" and that the conviction was correct.

IN this case the accused was arrested on a charge of theft, and on being searched he was found to have a dagger in his *paso*. He was arrested in a house in the village of Padingôn. He is described as a resident of the village of Kawda. The District Magistrate considers that the conviction is illegal on the ground that there is no evidence that the accused was going armed. He remarks:—

"This section [13] of the Arms Act [is] merely directed against unauthorized persons going armed along the public roads, etc. A person when in a house can, I take it, decorate himself with as many arms as he can carry."

Section 13 of the Arms Act prescribes that "no person shall go armed with any arms except under a license and to the extent and in the manner permitted thereby."

The mere possession of dagger in a house is not illegal; and in the present case the form of the charge is incorrect, as the accused was charged with being armed, and not with going armed.

But it is clear that the accused committed the offence created by the section above quoted. He was found in another man's house wearing a dagger. He did not allege that the dagger was not his or that he had not brought it to the house. On the contrary, he specified the purpose for which the dagger was used. In any reasonable construction of the facts, the accused was certainly going armed with a

Arms—19 (e).

dagger. There is nothing in the Act to limit the section in the manner suggested by the District Magistrate. But even if that limitation were applied, it would still be obvious that the accused in this case came armed to the house in which he was arrested. The conviction was correct and must be upheld.

QUEEN EMPRESS
v.
NGA THA BYAUNG.

The sentence passed on the accused, who was found going armed with a dagger and in possession of stolen property, was not excessive. He must be recommitted to jail to undergo the unexpired portion of his sentence.

Arms.

SECTION 19 (*f*). *See also* page 193.

Arrest—Illegal or irregular.

See also pages 31, 182, 211 and 239.

Chin Hills Regulation—4.

*Criminal
Miscellaneous
Case No. 22 of
1901.
December
12th.*

Chin Hills Regulation—4.

Before H. Adamson, Esq.

JHABROO v. KING-EMPEROR.

The law as regards persons other than Chins in the Chin Hills is that in force in Upper Burma exclusive of the town of Mandalay and the Court of the Judicial Commissioner is the High Court—Appeal from the Superintendent, Chin Hills, as District Magistrate lies to Superintendent as Sessions Judge, and not the High Court.

The accused was convicted under section 53 of the Post Office Act by the Superintendent of the Chin Hills acting as District Magistrate and sentenced to 18 months' rigorous imprisonment. The appeal was presented to the Local Government by whom it was transferred to the Court of the Judicial Commissioner for disposal.

Held,—that under section 4 of the Chin Hills Regulation the law as regards persons other than Chins in the Chin Hills is that in force in Upper Burma exclusive of the town of Mandalay and the Court of the Judicial Commissioner is the High Court.

Held also—that there is no appeal from a District Magistrate exercising his ordinary powers as a Magistrate to the High Court. The appeal lies from the Superintendent as District Magistrate to the Superintendent as Sessions Judge.

Pointed out—that under section 556, Code of Criminal Procedure, a Sessions Judge cannot hear an appeal from a judgment passed by himself. He can, however, under Regulation 5 of 1895 (amendment to the Upper Burma Criminal Justice Regulation), section XIV-A (1), after adopting the procedure of that section, direct that the appeal be transferred for trial to any other Sessions Judge.

This is the first case of the kind that has come from the Chin Hills. The appeal was presented to the Local Government, by whom it was transferred to this Court for disposal. Under section 4, Chin Hills Regulation, the Law as regards persons other than Chins in the Chin Hills is that in force in Upper Burma exclusive of the town of Mandalay, and the Court of the Judicial Commissioner, is the High Court. This is an appeal from the Superintendent of the Chin Hills acting as District Magistrate. There is no appeal from a District Magistrate exercising his ordinary powers as a Magistrate to the High Court. The appeal lies from the Superintendent as District Magistrate to the Superintendent as Sessions Judge. But under section 556, Criminal Procedure Code, a Sessions Judge cannot hear an appeal from a judgment passed by himself. He can, however, under Regulation No. 5 of 1895 (amendment to the Upper Burma Criminal Justice Regulation), section XIV-A (1), of the schedule, after adopting the procedure of that section, direct that the appeal be transferred for trial to any other Sessions Judge. With these remarks the petition of appeal and the proceedings are forwarded to the Superintendent and Sessions Judge, Chin Hills, for disposal.

Criminal Justice Regulation—XII.

Criminal Justice Regulation—XII.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS *v.* NGA PO MAUNG and NGA TUN PYAUNG.

Mr. H. M. Lütter, Government Prosecutor—for the Crown.

Power of District Magistrate in appeal or revision to require an accused person to furnish security to keep the peace under section 106, Code of Criminal Procedure.

*Criminal Revision
No. 622 of
1900.
August
21st.*

The accused were convicted under section 323, Indian Penal Code, by a second class Magistrate of causing hurt and sentenced to rigorous imprisonment for six months, as well as to pay a fine of Rs. 50, and in default to further rigorous imprisonment for one month and a half. The District Magistrate considered the case in revision; set aside the fine, and reduced the period of imprisonment to one month. At the same time he directed the two accused to furnish security to keep the peace for one year under section 106, Code of Criminal Procedure. The questions which arise are (1), whether the District Magistrate had power to pass this order in revision; and (2), whether he had power to pass it without giving the accused an opportunity of showing cause against it.

Held—that the District Magistrate might have passed the order under section 106, Code of Criminal Procedure, if he had been acting as an Appellate Court, although the order could not have been passed by the Magistrate who tried the case.

Held also—that a District Magistrate is competent in revision of the proceedings of a Magistrate of the second or third class, to require an accused person to furnish security to keep the peace under section 106, Code of Criminal Procedure.

Held also—that as the District Magistrate's order was to the prejudice of the accused they should have been given an opportunity of showing cause against it.

Reference :—

1, U. B. R., 1892—96, page 11.

THE accused were convicted by the second class Magistrate of causing hurt and sentenced to rigorous imprisonment for the excessive term of six months as well as to pay a fine of Rs. 50, and in default to further rigorous imprisonment for one month and a half. The District Magistrate considered the case in revision. If no appeal had been preferred when the case was considered in revision this was a very proper procedure. The powers of revision given to District Magistrates are intended to be freely used to correct the errors of Subordinate Magistrates; and it was not necessary for the District Magistrate to wait to see whether the accused intended to appeal. If an appeal was preferred before the District Magistrate dealt with the case in revision, it would have been better to deal with it on appeal.

The District Magistrate set aside the sentence of fine and reduced the period of imprisonment to one month. At the same time he directed the two accused to furnish security to keep the peace for one year. The questions which arise are (1), whether the District

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Magistrate had power to pass this order in revision; and (2), whether he had power to pass it without giving the accused an opportunity of showing cause against it. These points have been argued by the learned Government Prosecutor under the District Magistrate's instructions. Reported cases throw no light on the first point, the law having been altered by the Code of Criminal Procedure, 1898. Under section 106, sub-section 3 of the Code, an order under that section may be made by an Appellate Court. I think therefore that the District Magistrate might have passed the order under consideration if he had been acting as an Appellate Court, although the order could not have been passed by the Magistrate who tried the case. Even if the order be regarded as an enhancement of the original punishment, the only limitation on the Appellate Court's power of enhancement in appeal is that it shall not inflict a greater punishment than might have been inflicted by a Magistrate of the first class. (Criminal Justice Regulation Schedule, Section XIII.) As at present advised, I am of opinion that in appeal it would have been competent to the District Magistrate to pass the order.

As regards revision, the sub-section cited expressly limits the power of passing the order to the High Court when exercising its powers of revision. But in Upper Burma, under Section XII, sub-section 1 of the Schedule to the Criminal Justice Regulation, the District Magistrate may, in revision, pass such order as he thinks fit on the cases of Magistrates of the second and third class. The power conferred by this section is limited by the proviso that the District Magistrate shall not pass a severer sentence for the offence than might have been passed by the Magistrate who tried the case. But the proviso clearly distinguishes between sentences and orders, and there is no provision that the District Magistrate shall not in revision pass an order which the Magistrate who tried the case could not have passed. I have considered the ruling in *Queen-Empress v. Nga Chin** which decided that the District Magistrate could not set aside an order of an acquittal. But I think this case may be distinguished. So far as I can judge, a District Magistrate is competent, in revision of the proceedings of a Magistrate of the second or third class, to require the accused to furnish security to keep the peace under section 106, Code of Criminal Procedure.

As regards the second point the District Magistrate's order substituted a demand for security for one year, with the consequence of simple imprisonment for one year, in default of compliance, for a substantive sentence of rigorous imprisonment for six months and a fine of Rs. 50. The only question is whether this order was to the prejudice of the accused. If it was so, under Section XII of the Schedule to the Criminal Justice Regulation, the Magistrate was bound to give the accused an opportunity of showing cause against it. I think it must be held that the order was to the prejudice of the accused. The District Magistrate considered the substantive sentence excessive

*1, U. B. R., 1892—96, page 11.

Criminal Justice Regulation—XII.

and would presumably have reduced it on the merits. But, however this may be, an order involving possibly imprisonment for a year instead of imprisonment, though of a more severe kind, for $7\frac{1}{2}$ months must, I think, be held to be an order to the prejudice of the accused. And I am therefore of opinion that the accused should have had an opportunity of showing cause against it. It may be remarked that there is no provision to this effect in the case of an order in appeal. But as a matter of practice it is reasonable to give an accused person an opportunity of showing cause against any order to his prejudice which the Appellate Court proposes to make.

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v.
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It is impossible to say that the accused were not prejudiced by the omission to give them an opportunity of showing cause. The order requiring them to furnish security is therefore reversed. If they have furnished security the bonds are cancelled. If they are detained in prison they will be immediately released. There is nothing to prevent the institution of proceedings under section 107, Code of Criminal Procedure, against the accused, if the District Magistrate thinks fit so to direct.

Criminal Justice Regulation.

SCHEDULE SECTION XII

See also page 135.

SCHEDULE SECTION XV

See also pages 47 and 91.

Criminal Procedure—35.

Criminal Procedure—35.

Before H. Thirkell White, Esq., C.I.E.

SAW HLAING v. QUEEN-EMPRESS.

Mr. R. C. F. Swinhoe—for appellant.

Concurrent sentences passed at one trial not to be considered aggregate sentences for purpose of appeal.

The appellant was convicted on three charges and sentenced to imprisonment for four years on each charge, the sentences to run concurrently. The only question under consideration was whether the appeal lay to the High Court or to the Sessions Court.

Held—that sub-section (3) of section 35, Code of Criminal Procedure, applies to consecutive sentences only and not to sentences which run concurrently.

Held—that as the punishment, to which the appellant was sentenced is four and not twelve years' rigorous imprisonment, the appeal lies to the Court of Session and not the High Court.

Reference :—

Code of Criminal Procedure by Sir H. Prinsep, pages 26—29.

THE appellant has been convicted on three charges and sentenced to imprisonment for four years on each charge, the sentences to run concurrently. The only question at present under consideration is whether the appeal lies to this Court or to the Court of Session.

Under the Code of Criminal Procedure, 1882, no such question could arise as concurrent sentences were not allowed. Section 35 of the present Code enables a Court to direct that punishments shall run concurrently. Sub-section (3) of the same section enacts that, for the purpose of appeal aggregate sentences passed on convictions for several offences at one trial shall be deemed to be a single sentence. The learned Advocate for the appellant urges that in the present case there are aggregate sentences of imprisonment for twelve years in all, and that the appeal therefore lies to this Court. The contrary view is that when sentences run concurrently they are not aggregate sentences. This is, I think, the obvious view. The punishment to which the appellant in this case has been sentenced is rigorous imprisonment for four years, not for twelve years.

In seeking guidance to the decision between these conflicting views, I find in sub-section (2) of the same section that "in the case of consecutive sentences, it shall not be necessary for the Court, by reason of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court." The first six words of this sub-section do not appear in the corresponding section of the Code of 1882. They must have some meaning. If the view of the learned Advocate for the appellant is correct, then sub-section (2) does not refer to the case of the concurrent sentences; and in that case a Court is limited to its ordinary

*Criminal Miscellaneous
No. 3 of
1900.
April
7th.*

Criminal Procedure—35.

SAW HLAING
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QUEEN-EMPRESS.

power of sentencing for a single offence. This is an obvious absurdity. But if the words be taken as merely exegetical or expository of the case in which aggregate punishment can come under consideration, their use and meaning are clear. They have been introduced in order to make it certain that aggregate punishment can only be inflicted when there are consecutive sentences. If that is the meaning of "aggregate punishment" in sub-section (2), it seems reasonable to hold that the term "aggregate sentences" in sub-section (3) has the same signification.

There seems to be no judicial authority on the point. But I find that Sir H. Prinsep* has the following notes to section 35: "The 'consecutive sentences are to be taken in the aggregate as one sentence in regard to the right of appeal * * * When 'more than one sentence is passed to take effect consecutively, the 'aggregate sentence is to be deemed one sentence for purposes of 'appeal.' These remarks seem to imply the opinion of the learned commentator that sub-section (3) of section 35 of the Code of Criminal Procedure applies to consecutive sentences only and not to sentences which run concurrently. That seems to me the natural and obvious meaning of the sub-section.

I therefore hold that in the present case the appeal lies to the Court of Session and not to this Court. The petition of appeal will be returned with an intimation to this effect.

* Code of Criminal Procedure, 1898, pages 26—29.

Criminal Procedure—107.

Criminal Procedure—107.

Before H. Adamson, Esq.

QUEEN-EMPRESS v. NGA HMYIN AND TEN OTHERS

*Criminal Procedure, 107—Security for keeping the peace.**Criminal Revision
No. 320 of
1899.
May
13th.*

Held—that the act of which information is given and in respect of which security to keep the peace is required, must be an act which is shown to be in contemplation at the time the information is given, and not one the repetition of which may be expected from past misconduct or from mere repute as to character.

The eleven accused have been ordered to execute a bond with sureties for keeping the peace for a year. There was only one witness against them, and he merely testified to the fact that they were by repute disorderly persons. This is not sufficient to comply with section 107, Criminal Procedure Code. The act of which information is given, and in respect of which security to keep the peace is required, must be an act which is shown to be in contemplation at the time of the information given, and not one the repetition of which may be expected from past misconduct or from mere repute as to character. The order is therefore set aside.

Criminal Procedure—107, 112, 115.

Criminal Procedure—107, 112, 115.

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Before *H. Thirkell White, Esq., C.I.E.*

NGA PO KIN *v.* QUEEN-EMPRESS.

Criminal Revision
No. 635 of
1900.
July
30th.

Messrs. *Ba Ohn and Pillay*—for applicant. | *Mr. H. N. Hirjee*—for the Crown.
Security to keep the peace—Irregularity of procedure—Conditions necessary for demanding.

The accused, who is the leader of the young men of a village, was supposed to have instigated the throwing of stones at a theatre. He was called upon to furnish security to keep the peace for one year, on the grounds that no respectable man would hold the position which accused did, and that so long as he held that position he was a source of danger to the tranquility of the town.

It is admitted that the proceedings were irregular, inasmuch as the accused was summoned to Court on no specific charge and without any order being served on him as required by section 115, Code of Criminal Procedure. There was a further irregularity; for the order which was in due course recorded under section 112 of the Code did not recite any of the conditions mentioned in section 107 and called upon the accused to furnish security for good behaviour when the Magistrate's intention was that he should furnish security to keep the peace.

Held—that if it was thought that there was sufficient evidence to show that the accused had instigated the throwing of stones at the theatre he should have been prosecuted for any offence which he might thereby have committed.

Held also—that a presumption as to future probable conduct may often, though it cannot always necessarily, be drawn from past actions;

Held also—that in order to place an accused on security to keep the peace there must be evidence to show that some specific act likely to amount to, or to occasion a breach of the peace is contemplated.

References :—

- 1, Upper Burma Rulings, 1897-1901, page 15.
- 20, W. R., Criminal, page 57.
- I. L. R., 9, All., page 452.

Maung Po Kin has been called upon to furnish security to keep the peace for one year.

It is admitted that the proceedings were irregular inasmuch as the accused was summoned to Court on no specific charge and without any order being served on him as required by section 115 of the Code of Criminal Procedure. But this irregularity does not seem to have prejudiced the accused in any way. There is a further irregularity; for the order which was in due course recorded under section 112 of the Code does not recite any of the conditions mentioned in section 107, and calls upon the accused to furnish security for good behaviour when the Magistrate's intention was that he should furnish security to keep the peace.

The Magistrate proceeded to take evidence. He considered it proved that Po Kin was *kalata gaung* or *lubyo gaung* of his quarter by which I understand is meant leader of the young men; that no

Criminal Procedure—107, 112, 115.

respectable man would hold such a position: and that so long as Po Kin held that position he was a source of danger to the tranquility of the town. He also found that on the occasion of the performance of a *pwè* in the quarter, the accused demanded tickets for his young men, that after the refusal of the manager to give the tickets he assembled the young men by beat of gong; and that then stones were thrown at the theatre. When the tickets were given the stone throwing ceased. On these grounds he demanded security from Po Kin.

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Section 107 of the Code of Criminal Procedure empowers the Magistrate to require a person to show cause why he should not give security for keeping the peace, when he is informed that such person is likely to commit a breach of the peace or to disturb the public tranquility, or to do any wrongful act that may occasion a breach of the peace or disturb the public tranquility. In the case of the *Queen-Empress v. Nga Hmyin* * it was held by this Court that "the act of which information is given, and in respect of which security to keep the peace is required, must be an act which is shown to be in contemplation at the time of the information given and not one the repetition of which may be expected from past misconduct or from mere repute as to character."

In these proceedings I cannot find any indication of what specific act likely to cause a breach of the peace the accused was supposed to intend to commit. If it was thought that there was sufficient evidence to show that the accused had instigated the throwing of stones at the theatre, he should have been prosecuted for any offence which he might thereby have committed. If the performances were to be continued at the time when the proceedings against the accused were taken, and if it was reasonably apprehended that the accused would disturb them, I am not prepared to say that evidence of past acts might not justify the inference that they would be repeated. With great deference and respect, I am unable to accept entirely the remarks of my learned predecessor in the case of *Po Gyi*.† In that case it was said—

"The thing which it was attempted to prove was that the accused was concerned in a certain transaction * * which had already taken place. It is not very clear that such an affair did occur; but assuming that it did, the proper course was to prosecute accused for being concerned in it. The Magistrate apparently presumed that accused was likely to commit another breach of the peace of the same kind because he was concerned, as he believed, in this one. If that is logical, then *à fortiori* a person who has actually been proved to have taken part in such an affair and has been convicted and set at large again may be presumed with certainty to be likely to commit another similar breach of the peace, and may be proceeded against under Chapter VIII of the Code of Criminal Procedure. But surely this is a fallacy or a theory which cannot be worked upon in practice."

I venture to think that a presumption as to future probable conduct may often be drawn from past actions; and that this is recognized

* Page 15. | † Criminal Revision No. 1097 of 1897. Not reported.

Criminal Procedure—107, 112, 115.

NGA PO KIN
2.
QUEEN-EMPRESS.

by the Legislature in section 106 of the Code of Criminal Procedure, where the mere fact of conviction of certain offences is made ground for requiring security for future good conduct. I do not say that proof of past acts is always sufficient to justify a presumption as to future conduct. But I am of opinion that it cannot be laid down as a rule of law that such a presumption may not arise.

I think it is clear, however, that the law is correctly laid down in the case of *Ngri Hmyin* * above cited in so far as it declares that the act of which information is given must be one shown to be in contemplation at time of the information. I do not understand that ruling to go to extent of the passage cited from the case of *Po Gyi*† in declaring presumptions from past conduct inadmissible. If it does so, I respectfully dissent from it.

In the case of the *Queen-Empress v. Abdul Huq*‡ the High Court at Calcutta remarked:—

"The section calling upon parties for security to keep the peace refers to cases where there is a 'likelihood' of a breach of the peace being committed. Of course this must mean a reasonable likelihood, a reasonable probability that there will be such breach. In this case the Deputy Magistrate says that it was 'just possible' under the circumstances that a breach of the peace might take place. We think that is not sufficient; there must be something more than a 'bare possibility'; there must be a reasonable likelihood of a breach of the peace taking place, before a Magistrate can call upon any one to give security."

In the case of the *Queen-Empress v. Abdul Kadir* § the High Court at Allahabad observed:—

"I am willing to concede that the Magistrate may initiate proceedings under section 107 of the Code, upon any such information as may satisfy him as to the likelihood of a breach of the peace being committed. I am also prepared to hold that in holding the enquiry under section 107, the nature or *quantum* of evidence need not be so conclusive as in trials for offences. But at the same time I hold that in such enquiry the Magistrate should not proceed purely upon an apprehension of a breach of the peace, but is bound to see that substantial grounds for such an apprehension are established by proof of facts against each person implicated, which would lead to such a conclusion. What the nature of the facts should be is a question which of course depends upon the circumstances of each case; but I have no hesitation in thinking that when the nature of the information requires it, overt acts must be proved before the Magistrate can make an order under section 118 of the Code."

"As I have said, in this case I am unable to discover what specific act likely to occasion a breach of the peace the accused was supposed to contemplate. It could not be any act to cause a disturbance of the *peace* because the performances in his quarter had been discontinued. All that the District Magistrate finds is that as leader of the young men, so long as he continues to use his influence with them to a bad purpose, the accused is a source of danger to the tranquillity of the

* Page 15.

† Criminal Revision No. 1097 of 1897. Not reported.

‡ 20 W. R. Criminal 57.

§ I.L.R., 9, All., 452.

Criminal Procedure—107, 112, 115.

town. This appears to me to be a very vague apprehension of possible disturbance if some unspecified occasion should arise. I think that it does not afford sufficient ground for calling upon the accused to furnish security.

I therefore reverse the District Magistrate's order, and direct that the security bond executed by Po Kin and his sureties be cancelled.

NGA PO KIN
v.
QUEEN-EMPRESS.

Criminal Procedure—109.

Criminal Procedure—109.

Criminal Revision
No. 865,
1898.
March
2nd,
1899.

Before F. S. Copleston, Esq.

QUEEN-EMPRESS *v.* NGA E.

Criminal Procedure 109,—Security for good behaviour.

The accused was ordered to execute a bond for Rs. 75, with two sureties each to a like amount, for his good behaviour for six months. Soon afterwards he was convicted under section 4 of the Public Gambling Act* and was fined Rs. 15. The Magistrate thereupon ordered the accused to give fresh security for Rs. 75 with two sureties to a like amount. Subsequently Rs. 75 was realized from each of the two sureties.

Held—that fresh security could not be demanded without fresh proceedings.

Held also—that the sureties could not be required each to pay the full amount of the bond.

References:—

1, U. B. R., 1892—96, page 46.

1, U. B. R., 1897—1901, page 26.

IN Criminal Miscellaneous case No. 3 of 1898, Nga E was ordered by the Subdivisional Magistrate of Momeik under section 109, Criminal Procedure Code, to execute a bond for Rs. 75 with two sureties each to a like amount, for his good behaviour for six months. This was on the 5th August 1898. On the 16th September following Nga E was convicted and fined Rs. 15 under section 4 of the Public Gambling Act.* The Magistrate then called on him on the 20th September to give a bond for Rs. 75, with two sureties each to a like amount, to be of good behaviour for six months.

On the 25th September Nga E and his two sureties Nga Ko and Nga Pya, were ordered to pay up the amount of the bond—"the penalty of Rs. 75 each." The sureties paid up the amount of Rs. 150, and on appeal the District Magistrate refused to interfere.

It does not appear that Nga E paid up Rs. 75, the amount of his bond. Nor does he appear to have furnished fresh sureties as ordered by the Magistrate. He was committed to jail on the 20th September 1898, and the Magistrate ordered that the imprisonment in the security case should commence after the expiration of the sentence in Criminal Case No. 23 of 1898, which is the gambling case already referred to, and in which the order was that in default of payment of the fine of Rs. 15 Nga E should suffer rigorous imprisonment for two weeks.

It has recently been held by me in Criminal Revision No. 1088† of 1898 that a Magistrate has no power to order a person to give a fresh bond and fresh sureties after a forfeiture by him of a bond for good behaviour without a fresh proceeding. In this case the Magistrate made no such enquiry, nor was Nga E ordered even to show cause

* Section 11, Gambling Act, 1899. | † Page 26.

Criminal Procedure—109.

against being called on to execute a fresh bond with fresh sureties. The order of 20th September 1898 is therefore set aside and an order for the release of Nga E in case he is detained in prison under this order will issue. It was also held in the same revision case that the sureties cannot be called on to pay up more than the amount of the bond. It was therefore not legal to make the two sureties each pay Rs. 75, the full amount of the bond. It will be necessary therefore to order the refund of Rs. 75. The Magistrate does not appear to have considered whether under section 514 (5) he should exercise his discretion and remit any portion of the penalty. The offence of gambling was not a serious one, as the fine inflicted shows; and, in my opinion, it was not necessary, or even reasonable in the exercise of discretion, to exact the full penalty, and, of course, still less so to exact three times the amount of the bond as the Magistrate apparently intended to do. It will be sufficient if each surety be mulcted in Rs. 25 or a total sum of Rs. 50. The balance, Rs. 100, is to be refunded to the two sureties. There is one other point to be noticed. The Magistrate demanded security on the 20th September; but in the warrant of commitment he deferred the commencement of the term of imprisonment in default to the date of the expiry of a sentence Nga E was then undergoing. In the written order the Magistrate directed the accused person to give the bond and sureties within two days, but committed him to prison at once in default, with an order which makes no reference to the two days, but merely to the previous sentence as just pointed out. I am not aware of any power to defer the commencement of the term of imprisonment in default beyond the date within which the bond is to be furnished. In this Court's Criminal Revision No. 585 of 1896, *Queen-Empress v. Nga So*,* it was pointed out that section 397, Criminal Procedure Code, could not be applied in a case of this kind because an order of committal to prison in default of security is not a *sentence* of imprisonment.

QUEEN-EMPRESS
v.
NGA E.

* 1, U. B. R., 1892—96, page 46.

Criminal Procedure—109, 110.

Criminal Procedure—109, 110.

Criminal Revision
No. 1142,
1898.
December
19th.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS *v.* NGA NGWE GAING.

Criminal Procedure 109, 110—Proceedings under—ordinarily not to be instituted immediately after release of person from jail.

The accused, who was released from jail on 7th October, was arrested again on the 15th November, that is, after he had been free for five weeks, and ordered, under section 110, Code of Criminal Procedure, to furnish security for good behaviour.

The District Magistrate doubted whether the accused had been given sufficient time to show that he had no intention of leading an honest life and referred the case for the orders of the High Court.

Held—that it was not possible to lay down any definite limit of time within which proceedings under section 109 or section 110, Code of Criminal Procedure, should not be instituted against a person released from imprisonment either under one of those sections or under sentence for a substantive offence; but that sufficient time should be given to allow the accused a chance of reformation.

References :—

S. J. L. B., page 420.

—————533.

I DO not think that any definite period has been fixed in Lower Burma within which a person released from imprisonment in default of furnishing security to be of good behaviour should not again be proceeded against under section 109 or section 110, Criminal Procedure Code. The cases which the District Magistrate had in mind are probably those of *Lu Ke** and *Lein Baw U†*. In the former it was said.—

“It is not the intention of the Legislature that a series of security orders should be made in succession immediately after the release of a person discharged on the expiry of an earlier term of security. After the expiration of a term of security some new proof of bad livelihood, or the fact that the person is not capable of following any honest calling, is necessary before fresh security may be demanded.”

In the latter, Mr. Fulton remarked—

“It must be borne in mind that, when a man has been released from jail after the completion of his sentence, he must be given a fair chance of reformation and must not be called on to give security for good behaviour till there is satisfactory evidence to prove that he has returned to his evil courses.”

The principal expressed in the above quotations may well be adopted. But it is not possible to lay down any definite limit of time within which proceedings under section 109 or section 110, Criminal Procedure Code, should not be instituted against a person released from imprisonment either under one of those sections or under sentence for a substantive offence. Each case must be dealt with on its merits

* S. J. L. B., page 420.

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† S. J. L. B., page 533.

Criminal Procedure—109, 110.

with due regard to all the circumstances. In the present case the Magistrate considered it proved that the accused had resumed his former course of life. If that is so, the order does not seem open to objection. But it must be admitted that a very short interval elapsed between the release of the accused and the date of the order. And it may be doubted whether the accused had sufficient time to show that he had no intention of leading an honest life.

There has been no application for revision. The District Magistrate has full power to deal with the case on its merits and to pass orders under section 124 or section 125, Criminal Procedure Code. He should now proceed to consider the case in the light of the above remarks and to pass such orders as may be proper.

QUEEN-EMPRESS
v.
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Criminal Procedure—109, 110, 112.

Criminal Procedure—109, 110, 112.

Before G. W. Shaw, Esq.

KING-EMPEROR v. NGA YE E.

Criminal Revision
No. 284 of
1901.
June
7th.

Security for good behaviour—Difference between sections 109 and 110 pointed out—Errors in procedure.

The accused was sent up under section 110, Criminal Procedure Code. The Magistrate sanctioned prosecution under section 109 and under 112, Criminal Procedure Code, summarized the information as follows: "No ostensible means of subsistence, association with bad characters, and habitual stealing."

He proceeded to call upon the accused to show cause why he should not furnish "two sureties worth Rs. 300," and execute a bond himself for Rs. 100, but did not specify under what section.

Held—that the Magistrate ought to have kept to section 110, Criminal Procedure Code, in his order under section 112 in view of the information about the habitual stealing. If the evidence failed to establish this a final order could have been passed under section 109. If the order under section 112 is made under section 109, a final order cannot be made under section 110.

Pointed out—that there is only one penalty of a bond. The principal is bound in this amount and if he has to furnish sureties they are bound for the same amount. They may be jointly and severally liable for it or may be each liable for a part.

Reference.—1, U. B. R., 1897—1901, page 26.

The Police classed the case as one falling under section 110. The Magistrate sanctioned prosecution under section 109, Criminal Procedure Code. In his order under section 112 he summarizes the information as follows: "No ostensible means of subsistence," "association with bad characters," and "habitual stealing." He then proceeds to call upon accused to show cause why he should not furnish "two sureties worth Rs. 300" and execute a bond himself for Rs. 100, but does not specify under what section. In his judgment he refers to accused having been proved by the evidence to bear the reputation of a thief and an associate of bad characters, and finally orders accused, apparently under section 109, Criminal Procedure Code, to execute a bond with two sureties in Rs. 150 each. There are several mistakes here. It is not apparent what distinction the Magistrate conceives there is between section 109 and section 110, but it is evident that he did not read these sections before he recorded these proceedings.

Section 109 covers the cases of—

- (a) A person taking precautions to conceal his presence, etc.
- (b) A person who has no ostensible means of subsistence.

Section 110 deals with six other classes of persons:—

- (a) A habitual robber, house-breaker or thief.
- (b) A habitual receiver of stolen property,
- (c) A habitual harbourer of thieves or aider in concealment, etc., of stolen property.
- (d) A habitual committer of mischief, extortion, etc.

Criminal Procedure—109, 110, 112.

(e) A habitual committer of offences involving a breach of the peace.

(f) A person so desperate and dangerous that his being at large without security is a danger to the community.

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The habitual thief is not dealt with by section 109 and the "associate of bad characters" does not appear in either section.

The Magistrate ought to have kept to section 110, Criminal Procedure Code, in his order under section 112 in view of the information about the habitual stealing. If the evidence failed to establish this, a final order could have been passed under section 109. If the order under section 112 is made under section 109 a final order cannot be made under section 110. The Magistrate's attention is drawn to section 118, proviso 1. He has already overlooked this provision by ordering the accused to find security to the extent of Rs. 300, when his order under section 112 limited the security to Rs. 100. The bond omits to specify the amount in which the accused is bound.

The order under section 112 contained another mistake in that it directed accused to execute a bond for Rs. 100 and to furnish two sureties for Rs. 300. This is impossible. As pointed out at page 26 there is only one penalty of a bond. The principal is bound in this amount, and if he has to furnish sureties, they are bound for the same amount. They may be jointly and severally liable for it or may be each liable for a part.

In the present case the Magistrate was prevented by section 118, proviso 1, from requiring accused to execute a bond for more than Rs. 100 and the sureties could not be bound to make good more than this amount.

The order is altered to one directing accused to execute a bond under section 109 for his good behaviour for one year for Rs. 100, with two sureties jointly and severally liable for the same amount, or in default, that accused be imprisoned rigorously for one year.

The accused and sureties should be required to execute an amended bond.

Criminal Procedure—109, 118.

Criminal Procedure—109, 118.

Before F. S. Coppleston, Esq.

QUEEN-EMPRESS *v.* NGA HLA.

Criminal Procedure, 109, 118—Security for good behaviour.

Criminal Revision
No. 1088 of
1898.
February
17th,
1899.

The accused was ordered to enter into a bond in the sum of Rs. 50 with three sureties to be of good behaviour for one year. Security was furnished. Soon afterwards the accused was convicted under section 34, Police Act, and was fined Rs. 2. The Magistrate thereupon ordered the accused to be rigorously imprisoned for the remainder of the term of security, or till he furnished fresh security, and realized Rs. 50 from each of the sureties.

Held,—that the order committing the accused to prison was illegal.

Held also,—that fresh security could not be demanded without fresh proceedings.

Held also,—that the sureties could not be required each to pay the full amount of the bond; that only the amount entered in the bond could be recovered from the accused and his sureties or any of them.

Held also,—that under the circumstances the full amount of the bond should not have been recovered.

ONE Nga Hla was on the 16th September 1898 ordered to enter into a bond in the sum of Rs. 50 with three sureties in the like amount to be of good behaviour within one year; failing which he was to be rigorously imprisoned for that period or until security was furnished.

Security was furnished and the three securities signed for Rs. 50 each. On the 9th November following Nga Hla was convicted under section 34, Police Act, of drunkenness and was fined Rs. 2. The Magistrate, who had taken the bond under sections 109 and 118, Criminal Procedure Code, thereupon ordered Nga Hla to be "rigorously imprisoned for the remaining term of the said bond, until fresh security be furnished and accepted and the sum in the said bond be realized from him and his sureties."

Fresh security was furnished and apparently Nga Hla signed a new bond and was released about the 22nd November.

The original sureties were on the 9th November called on to show cause why they should not each forfeit Rs. 50, the amount mentioned in the bond. On the 11th November the Magistrate recorded that no explanation whatever had been offered by the sureties, and directed the three persons, Nga Tha Zan, Nga Po Thet, and Nga Tha Gywè, to pay in Rs. 50 each, and on the following day Rs. 150 was paid in accordingly.

The order forfeiting the bond was legal, but the order committing Nga Hla to prison for the remaining period of the bond or pending the furnishing of new security was illegal. The Magistrate has not quoted any authority for such an order. It is not sanctioned by section 123, Criminal Procedure Code, or by any other section of the Code, so far as I know. Nor was the order demanding fresh security warranted by law, except, it may be after fresh proceedings under Chapter VIII.

Criminal Procedure—109, 118.

I pass on to the order requiring the sureties to pay up Rs. 50 each. Action under section 514, Criminal Procedure Code, was justifiable, but the offence of which Nga Hla had been convicted was a trivial one and the Magistrate would perhaps have exercised a reasonable discretion had he refrained from calling on the persons bound by the bond to pay the penalty or show cause against doing so.

In any case, having decided to proceed, the Court should, in its discretion, have remitted part of the penalty mentioned and have enforced payment in part only. In calling on the sureties to pay up the full amount the Magistrate failed to exercise proper discretion. On the face of it, it seems extraordinary that the criminal should be fined Rs. 2 and his sureties Rs. 150. It does not appear that the proceedings were taken against Nga Hla himself under section 514.

The original order requiring a bond for Rs. 50 and sureties to the extent of Rs. 50 each was legal if it meant that the sureties bound themselves severally to pay Rs. 50 in case of default, but, as interpreted by the Magistrate, appears to have been illegal. Sections 109 and 118 deal with the *execution of bond with sureties*, that is to say, the accused person executes a bond for the amount decided on under section 118 and furnishes sureties for the payment of that amount. The sureties are not to bind themselves to pay up each and all the full amount of the bond in the case of forfeiture, but are to bind themselves in such amounts as may be fit so as to secure the amount of the bond. In the present case a legal order would have been for the sureties to bind themselves jointly and severally to forfeit Rs. 50. This is indicated also in Form XI, Schedule V, Criminal Procedure Code. Either of the sureties was properly liable for Rs. 50; they were also jointly liable for Rs. 50; but they were not properly made liable for Rs. 150. Each again might, for instance, have been made liable for the bond for a third part of Rs. 50.

It now merely remains to pass such orders as will, as far as may be, remedy the errors committed. The bond furnished on or about the 22nd November is cancelled. The amount to be forfeited by each surety is reduced to Rs. 5 each. The balance will be refunded.

QUEEN-EMPRESS
v.
NGA HLA.

Criminal Procedure—123 (2).

Criminal Procedure—123 (2).

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS *v.* NGA PAW AND ANOTHER.

Criminal Revision
No. 1167 of
1898.
December
24th.

Criminal Procedure 123 (2)—Security for good behaviour—Imprisonment in default.

When the period for which security is demanded exceeds one year, if security is not given, imprisonment in default cannot be awarded by a Magistrate. The accused should be detained pending the orders of the Sessions Judge.

It appears to be necessary to draw the attention of Magistrates to section 123, sub-section 2, of the Code of Criminal Procedure. This is the third case which has recently come before me from three separate districts, in which a Magistrate has overlooked or disregarded the provisions of that sub-section. When the period for which security is demanded exceeds one year, if security is not given, the Magistrate cannot award imprisonment in default. He must direct the detention of the accused pending the orders of the Sessions Judge, to whom the proceedings must be submitted.

The District Magistrate has dealt with this case on its merits and no further action is necessary.

Criminal Procedure—161.

Criminal Procedure—161.

Before G. D. Burgess, Esq., C.S.I.

NGA PO HMI v. QUEEN-EMPRESS.

Criminal Revision
No. 579 of
1897.
July
22nd.

Criminal Procedure Code, 161, 172—Statements reduced into writing under section 161 are distinct from the diary maintained under section 172, but the Police Officer reducing such statements into writing is a public servant charged with their preparation within the meaning of section 167, Penal Code.

Application for revision.

The applicant—accused, a police sergeant, was convicted under section 161, Penal Code, and sentenced to six months' rigorous imprisonment for that he, being a public servant charged with the preparation of a document, had framed such document in a manner which he knew or believed to be incorrect, intending thereby to cause, or knowing it to be likely that he might thereby cause, injury to an accused person.

The accused reduced to writing under section 161, Code of Criminal Procedure, the statements of certain witnesses in such a way as to make it appear that the person accused in the case under investigation had committed an offence, although the witnesses in reality had not said what they were represented as saying. Section 161 says that the investigating police officer "may reduce into writing any statement made by the person so examined," and the question was whether, under the terms of the section, the police sergeant was charged with the preparation of the documents.

Held,—that it was obvious from the circumstances and from the prescribed duties of police officers, that if such reduction to writing is made, it is not for the mere personal benefit of the investigating police officer, but is an act done in his official capacity; and that the police officer is required to make a true record, if he makes any at all, for it would be worse than useless to leave him at liberty to put down anything that might suit himself.

Application dismissed.

References.—

I. L. R., 16, Cal., 610.

I. L. R., 4, Mad., 144.

THE documents made in this case cannot be treated as part of the special diary prescribed by section 172, Code of Criminal Procedure, and the District Magistrate's argument on this point will not hold good. That such statements, recorded under section 161, are no portion of the diary has been decided in 16, Cal., 610, and that decision is clearly in accordance with the provisions of the Code. Its correctness is admitted in section 585* of the Police Manual.

The Subdivisional Magistrate reports that the diary was closed before the statements were recorded, so that they could not be incorporated as part of it as the District Magistrate desires to contend. The question then is whether, having been recorded under section 161, they can be considered as documents with the preparation of which accused was charged. The difficulty lies in the meaning that ought

* [Paragraph 623 of the second edition, Police Manual, 1899.]

Criminal Procedure—161.

NGA PO HMI ^{v.} QUEEN-EMPRESS. to be given to the word "charged." Section 161, Code of Criminal Procedure, merely says that the investigating police officer *may* reduce into writing any statement made by a person examined by him under the section.

It is obvious, however, that if such reduction to writing is made, it is not for the mere personal benefit of the police officer, but is an act done in his official capacity, and every day use made of the record thus obtained, although such use is limited by the provisions of section 162 and those of the Evidence Act.

Section 561* of the Police Manual now requires statements so recorded to be attached to the final report, and *See 4, Madras, 144.* section 585A† gives further directions and requires that each day's proceedings be signed by the officer making the investigation. As a matter of common sense it follows that the police officer is required to make a true record, if he makes any at all, for it would be worse than useless to leave him at liberty to put down anything that might suit himself.

The point is not free from doubt, but as at present advised, I come to the conclusion that, although it is optional with the police officer to make a record or not, he may be said to be charged with its preparation when he decides that it should be made.

Under these circumstances there will be no interference, and the application for revision is dismissed.

* [Paragraph 592 of the second edition, Police Manual, 1899.]

† [Paragraph 624 of the second edition, Police Manual, 1899.]

**Criminal Procedure—161-154, 155, 156, 162-200,
202, 204-235 (1).**

Criminal Procedure—161-154, 155, 156, 162-200, 202, 204-235 (1).

Before G. D. Burgess, Esq., C.S.I.

NGA PO KÈ v. QUEEN-EMPRESS.

Mr. H. M. Lütter—Government Prosecutor, for the Crown.

Criminal Procedure Code, 161-154, 155, 156, 162-200, 202, 204-235 (1).

An investigation by the police under section 161, Code of Criminal Procedure, is a stage of a judicial proceeding within the meaning of explanation 2 to section 193, Penal Code.

Various irregularities of procedure.

154—Formal information not taken down at time it was laid.

155—Illegal arrest by police without warrant for an offence under sections 193—409, Penal Code.

155—200, 202, 204.—Without examination of complainant and without issue of warrant, police directed to investigate in a non-cognizable case and accused given into police custody.

161—Statement of person examined by police under section 161 reduced to writing wrongly admitted as documentary evidence.—Evidence Act, 80—91.

Prevailing tendency to assume or take for granted many things which ought to be proved.—Evidence Act, 57—101.

235 (1)—“Transaction”—meaning of word.

The accused, a thugyi, was convicted under section 409, Penal Code, of criminal breach of trust of certain revenue collections, and under section 193 of intentionally giving false evidence in a stage of a judicial proceeding, by telling a false story of a dacoity to account for the defalcation in the course of a police investigation.

Held,—that an investigation conducted by a police officer under section 161, Code of Criminal Procedure, is a stage of a judicial proceeding within the plain, literal meaning of explanation 2 of section 193, Penal Code.

Various irregularities in matters of procedure and faults in regard to evidence commonly committed in the trial of criminal cases commented on and pointed out for avoidance by the Courts.

References—

1, U. B. R., 1892-96, p. 195.

1. L. R., 9, Cal., 455.

1. L. R., 11, Bom., 657 and 659.

1. L. R., 11, Bom., 702.

Mayne's Criminal Law of India. Starling's Penal Code 9, M. and W., 378, 23, L. J. C. P., 108.

THE circumstances of this case are clearly stated in the evidence of the second witness for the prosecution, which was as follows:—

Deposition of Nga Wa, second witness, for prosecution—“On the *Tagu lasan*, 9th day, I was called by the accused thugyi to come with a cart to Mandalay. I went with him and we left that night at 9 P.M. and arrived at Ywazu village at about men's sleeping time. We had a teak box and a tin box and a *dalwè* in the

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No. 65 of
1897.
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15th*

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cart with us and a few mats. At Ywazu I was told by accused to open the teak box and I did so, and I found in it a black *paso* and a large stone and Rs. 8 in case. In the tin box I saw some books which looked like *Thathameda* books. At Ywazu, before I called the villagers, the accused said that I was to say before the villagers when I dropped the Rs. 2 into the box (the Rs. 2 which I was to get from Ma Hmwe Bôn on account of *kaing* revenue) that I was to say that there was Rs. 673 in the box, and that I was to drop the Rs. 2 on the stone to make it sound. I then called the villagers and after they had gone, the accused called Maung Kyaw and told him to get a chicken from Maung Saing and that he (accused) would pay for it. When the chicken was brought by Maung Kyaw I was tied on to the cart. At early morning we went on to Hnyebotaung and the accused told me to turn the cart off the road, and the accused took a tin box, and I, the wooden box, and Maung Yan Nyein took the chicken and the *da*, and we went into jungle. We killed the chicken and cut up the boxes and cut two big books with the *da* and the blood of the chicken was smeared on the books, and round about the cart; and the accused himself gave the roof of the cart two cuts, and he also cut his own hair and then, that the chicken's blood might not fall anywhere else, I was told to take the chicken off and bury it, which I did do. The accused thugyi also told us on the road that when the Government asked us we were to say without any fear that Rs. 673 Government revenue had been taken away by dacoits. We all three went back on foot to Shwepyi and reported at the guard what had happened, namely, that we had been attacked by dacoits. The accused, myself, and Maung Yan Nyein all three went and reported, and then I went off, and getting cart, accused returned to Kyunsi. When I got back I met head constable Maung Po, and I was told to show the road to Kadetchin, and I then on the road made a clean breast of the whole affair and explained everything, and how that it was not a dacoity at all. I afterwards went to the Assistant Superintendent of Police and showed the place where the chicken's body was concealed. I was afraid of the thugyi and hence reported what was false.

"At the *Zayat* at Ywazu the thugyi (accused) at first said that he had not got any Government revenue, and that he could not pay any in, and that he intended getting up a false dacoity.

Cross-examination—*Nil.*"

THE third witness for the prosecution, Yan Nyein, who was along with accused and Nga Wa gave similar evidence to the above.

Both these men were accomplices, but they are fully corroborated by the evidence of independent witnesses and by the admissions of accused himself, who does not attempt in appeal to deny the main facts, but seeks to excuse himself on the grounds that he was intoxicated and that the real culprit is Nga Wa.

There can be no doubt, however, that the accused appellant himself was the contriver of the whole affair, and that he deserves the sole credit of the very considerable dramatic talent and the attention to the details of stage management which the arrangements made display.

On these facts the accused has been convicted by the District Magistrate on two charges, one of criminal breach of trust as a public servant under section 409, Penal Code, and the other of intentionally giving false evidence in a stage of a judicial proceeding under the first part of section 193, and has been sentenced to three years' and two years' rigorous imprisonment respectively for those offences.

**Criminal Procedure—161-154, 155, 156, 162-200, 202,
204-235 (1).**

The Court of Session has, in a careful judgment, taken notice of some of the faults in the proceedings, but has, notwithstanding, confirmed the conviction on both charges and the aggregate sentence of five years' imprisonment, on the findings that there is sufficient evidence on record and that any irregularity that may have been committed has not caused a failure of justice and may be cured under the provisions of section XV of the schedule to the Criminal Justice Regulation.

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The Court of Session is perhaps right in its view that, in the particular circumstances of this case, the accused has not been substantially prejudiced, but criminal proceedings should be so conducted as to avoid throwing on the superior Courts the burden of making special allowance for errors and defects, and it will probably be useful to take this opportunity of pointing out for the instruction of Criminal Courts the faults that are most prominent in the present proceedings.

In the first place, then, the institution of the proceedings was irregular. The accused was arrested by the Police at the outset, although the Police are not at liberty to arrest without warrant for an offence under either section 409 or 193, Penal Code. This illegal arrest was made, not by an ordinary Burman Police-constable, but by an English Assistant Superintendent of Police, who ought to have known the law.

It is hardly necessary to say that it is the duty of a Police Officer to see that the law is obeyed, and not broken. If a Police Officer wilfully breaks the law himself, the offence committed is a particularly aggravated one because of the bad example it sets, and of the contempt into which it is liable to bring the law. If a Police Officer, inferior or superior, makes an illegal arrest he exposes himself to prosecution and punishment for wrongful confinement. Offences of this kind have been occurring recently, and it is desirable that Police Officers should be on their guard lest the necessity should occur in some flagrant instance of applying the deterrent of an exemplary sentence.

Subsequently the papers in the case were laid before the District Magistrate by the Subdivisional Magistrate, and here another irregularity took place. The District Magistrate directed that an investigation should be made by the Police and that the accused should be sent up for trial at its conclusion. •

This was not in accordance with the law which is laid down in sections 200—204 of the Code of Criminal Procedure. No warrant appears to have been issued, and the entry in the diary is that accused was sent up in custody. An order to the Police to investigate does not convert a case from a non-cognizable into a cognizable one; on the contrary, the power to arrest without warrant is expressly taken from the Police in the investigation of a non-cognizable offence by section 155, Code of Criminal Procedure.

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If the Police are bound to a scrupulous observance of the law, it is needless to dwell on the stringent obligations under which the Magistracy lie in this respect.

Before passing from the preliminary stage of the case to the trial, it is desirable to notice that the provisions of section 154, Code of Criminal Procedure, were not carried out by the police officer in charge of the police-station at which information of the alleged dacoity was laid.

The Assistant Superintendent of Police states in his deposition that the accused's "formal complaint was not taken down till after his arrest, as the sergeant was apparently so astonished at the report of the dacoity that he brought the news to me without at once recording his complaint."

The provisions of section 154 are of high importance, and failure to comply with them is apt to result in the loss of valuable documentary evidence.

We may now pass to the trial, where the prevailing tendency—and it is a very common one in the Courts—is to assume or take for granted many things which ought to be proved. This is a very natural mistake, and an easy one to fall into, for one is very apt unconsciously to act on one's own knowledge or supposed knowledge of matters which really require to be distinctly established by proof in the ordinary way. Thus the accused is loosely spoken of as the thugyi collecting the revenue, but there is no evidence on record as to his appointment, position, or duties. The persons who are said to have paid him revenue have not been called as witnesses, the amount he actually collected is left uncertain, and there is no evidence to show that the money never reached the treasury or the hands of the officer to whom the accused ought to have paid it over.

It is even somewhat obscure in what capacity accused should be considered to have had the money in his possession, whether in that of an agent of the State to receive the money, or that of an agent of the people to convey the money to the proper quarter, which are two very different things.

Of course we all know, or fancy we know, what are the duties and position of a thugyi, but I am not at all sure that the common notions on the subject are well-founded.

In a judicial proceeding, and especially in a criminal trial, no room for doubt should be left upon any point which it is possible to make clear by evidence.

The Evidence Act lays down the rules for proving the facts, upon the existence of which is dependent the legal liability that the Court has to give judgment regarding. Generally such facts have to be made out by the oral statements of witnesses and by documents, but for the sake of convenience the Courts are allowed to take judicial notice of certain facts which are specified in section 57 of the Act. Among these are all laws and rules having the force of law

Section 101.

Section 57.

**Criminal Procedure—161-154, 155, 156, 162-200, 202,
204-235 (1).**

in British India, and when such laws or rules are relied on they should be duly quoted under the section. Otherwise it is of course impossible to tell what is in mind of the Court.

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Here the District Magistrate has not mentioned any law or rules bearing on the subject in question, though he might have referred to the Village Regulation and the Land and Revenue Regulation and the rules made under them.

Assuming that the accused was appointed under and was governed by these provisions of law, I do not think it is necessary to discuss the exact position of a thugyi under them, because the confessions of the accused amount to this that he had collected a sum of at least Rs. 270 on account of revenue which it was his business to pay in at the headquarters of the district, and that, on his way there for the purpose, he allowed the money to disappear in the hands of Nga Wa, and then told a false story of a dacoity in order to account for and cover the loss. On his own showing the accused has thus committed, or abetted the commission of the offence of criminal breach of trust, either under section 409 or under section 406, and the question of punishment may be considered later on.

But the prosecution should not have relied on the admissions of the accused to supply the defectiveness of its own materials, but should have furnished every link wanted to make the claim of proof complete.

Lastly, we come to the charge under section 193, and here too there are many imperfections in the proceedings.

The offence charged consisted in answering untruly questions relating to a case under investigation by a police officer under the provisions of Chapter XIV of the Code of Criminal Procedure.

The police officer meant was the Assistant Superintendent of the subdivision.

Under section 550,* Code of Criminal Procedure, police officers superior in rank to an officer in charge of a police-station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station, and section 156 gives a police officer in charge of a station the power of investigation in a cognizable case.

The Assistant Superintendent of Police does not say that he was in the position described, though doubtless this was so. It should have been stated, however.

*Sec. 551 of the Code of Criminal Procedure, 1898.

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He does not even say that he was making an investigation under the chapter, though his deposition certainly implies it. His deposition was the following:—

Deposition of Subdivisional Assistant Superintendent of Police, first witness for prosecution.

"I know the accused; he is the thugyi of Kyunsi village. At 7 o'clock A.M. on the 11th April 1897 the thugyi (accused) was brought up by one of my constables at Shwepyi. He was not in custody, and the constable said that the accused thugyi had laid a complaint of dacoity at the guard. I then examined the accused Maung Kè both orally and in writing (Exhibit A).

"The statement Exhibit A is the one I took down at once; at that time the thugyi was not under arrest, and was examined as an ordinary complainant. I then took the accused and went to the scene of the crime with him as I believed then his statement. We went to the Chinthegan tank, and about a mile from it found the thugyi's cart turned off the road to the east side. On the mat roof of the cart I found two *da* cuts, and on the ground pieces of the thugyi's hair, which the thugyi (accused) had previously said had been cut off by a *da* cut from the dacoits. I also saw blood stains on the ground and round about the cart and on the cart pole.

"I then commenced to search for the boxes, which I expected to find in the jungle and Maung Kè pointed to the east side saying the dacoits had run that way. About thirty yards into the jungle I found the two boxes forced open, and in the direction pointed out by the accused a lot of paper covered with blood stains was also found cut up. The accused had told me that he had wounded two of the dacoits, one on the wrist and one on the thigh, and that I should find blood stains. I then started off to track. I went with a first class constable and found none, so returned to the other party, with which was the accused Maung Kè. They shouted out they had found foot-prints. I saw some foot-prints, though they need not necessarily have been those of the alleged dacoits. On arriving at Kadetchin village that night at about dark, I met the head constable Maung Po, who had with him Maung Wa and Maung Yan Nyein, the thugyi's companions. The head constable told me they had made certain statements, and I consequently examined the two men, and finding that they both agreed that the dacoity story was a false one, I arrested Maung Kè. I arrested Maung Kè at about 7-30 P.M. Maung Wa and Maung Nyein told me that a chicken's throat had been cut, and that the blood had been produced from it. That night, at 8-30, I accordingly went off with Maung Wa and Maung Nyein and the head constable and got to the scene of crime, and having searched Maung Wa's person to see that he had nothing concealed on his person, I was pointed out by him the chicken's body concealed in the jungle. I then went to Maung Kyaw's house, whence the chicken was said to have been procured, and he admitted getting it for the thugyi. I examined Maung Kyaw and Maung Saing as to the getting of the chicken by the thugyi, and Maung Saing identified the chicken's body I showed him as the one he had procured for the thugyi. I did not examine Maung Kè again after I had arrested him, but the head constable did. His formal complaint was not taken down till after his arrest, as the Sergeant was apparently so astonished at the report of the dacoity that he brought the news to me without at once recording his complaint. I recognize all the exhibits. I did not see any money."

The witness did not say, and does not seem to have been asked, what questions he put to the accused. The word "examined" implies that he put certain questions, but it should have been stated what they were.

**Criminal Procedure—161-154, 155, 156, 162-200, 202,
204-235(1).**

In the cases reported in 1, U. B. R., 1892-96, page 195, and the Printed Judgments* of 1896, page 80, I have held that the word "examine" implies the putting of questions, and that a single question may be sufficient so long as it is made clear to the person examined upon what points he is required to speak, but evidence of the questions put should not be dispensed with.

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Not only are the questions not proved here, but neither are the answers, except in the fragmentary way mentioned in the deposition. The witness examined the accused in writing, and the writing is referred to as Exhibit A, and Exhibit A is on the record. But it is not evidence. It is not a record prescribed by law; section 161 of the Code of Criminal Procedure merely allows it to be made, while section 162 expressly forbids its use as evidence. It does not come under the provisions of section 80 of the Evidence Act, since it is not evidence, and section 91 does not apply, since it is not a "matter required by law to be reduced to the form of a document." The only way in which it could be used would be to permit the witness to refer to it to refresh his memory under section 159 of the Evidence Act.

It would appear simpler, and more consistent with the definition of "document" in section 3 of the Evidence Act, to treat the writing itself as documentary evidence for what it is worth, the writer of course being a necessary witness to answer for its correctness, which could be tested by cross-examination, but the law seems to be as above-stated, so that the writing itself is not admissible in evidence. See the cases cited below, and also 9 Cal., 455.

As the record stands, therefore, there is some difficulty in finding what were the answers given about the alleged dacoity when the accused was examined by the Assistant Superintendent of Police. The accused himself says he was not examined like a witness before his arrest, but the evidence of the Assistant Superintendent of Police on this point is distinct.

The accused in his confession to the Subdivisional Magistrate stated: "I thereafter accompanied the Assistant Superintendent of Police and showed him the place where I stated I had been dacoited." If this statement and the several statements mentioned in the Assistant Superintendent of Police's deposition be pieced together, they would seem to amount, plainly enough, to an assertion by accused that he had been attacked by dacoits, with whom he had a desperate conflict, an assertion which he now admits to be false.

It is probably not absolutely necessary, therefore, to cause additional evidence to be taken, though it is manifestly most unsatisfactory to have to deal with a record in this condition.

Taking it then that there is sufficient evidence to make out that the accused did not answer truly, as he was by law bound to do all questions put to him relating to the reported case of dacoity, touching which

* Not reprinted.

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the police officer putting the questions was making an investigation under Chapter XIV of the Code of Criminal Procedure, the next point for consideration is whether such investigation was a stage of a judicial proceeding.

The definition of the offence of giving false evidence in section 191 of the Penal Code contains an ambiguity, because such offence may be committed according to that definition, although no "evidence," in the strict sense of the word, is given. To avoid the confusion inseparable from the employment of an ambiguous expression, it will be convenient to use the well understood word "perjury" to signify the offence which the Penal Code makes punishable. Perjury, then means the stating of an untruth where there is a legal obligation to state the truth, whether the statement happens to be evidence or not. A statement made by a person examined at a police investigation under section 161, Code of Criminal Procedure, is not evidence, because section 162 explicitly declares that it is not. Section 4, clause (d),* of the Code of Criminal Procedure defines a "judicial proceeding" as "any proceeding in the course of which evidence is or may be legally taken," and consequently a proceeding under section 161 cannot be a judicial proceeding according to this definition.

The High Court of Bombay has held that a statement made under section 161, Code of Criminal Procedure, is not evidence, either for or against the accused, at any stage of a judicial proceeding (11 Bom., 657 and 659), and even that a statement taken by a Magistrate under section 164 is not evidence in a stage of a judicial proceeding—11 Bom., 702.

In none of these cases, however, nor in a number of others which have been examined, does attention seem to have been directed to explanation 2 to section 193, Penal Code, which says: "An investigation directed by law preliminary to a proceeding before a Court of justice is a stage of a judicial proceeding, though that investigation may not take place before a Court of justice."

There is no little difficulty, as is admitted by the learned Government Prosecutor, of whose valuable assistance the Court has had the benefit at the hearing of this appeal, in arriving at the meaning of this explanation. A single illustration is given, which of course cannot be exhaustive, and that illustration refers to an enquiry by a Magistrate for the purpose of ascertaining whether an accused person should be committed for trial.

An inquiry is a proceeding in which evidence is taken, and so would come under the definition of "judicial proceeding" in clause

[* Sec. 4, clause (m) of the Code of Criminal Procedure, 1898.]

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(d)* of section 4, Code of Criminal Procedure. "Inquiry" is defined in section 4 (c)† while "Investigation" is defined in clause (b)‡ as including "all the proceedings under this Code for the collection of evidence conducted by the police....."

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It is obvious that the word "investigation" in the Penal Code was not employed in the technical sense of the foregoing definition. The Penal Code, though it did not come into force till the 1st of January 1862, was passed in 1860, and the first Code of Criminal Procedure, XXV of 1861, did not come into force till the same date. The language of the Penal Code could not therefore have had reference to the definitions in any of the Codes of Criminal Procedure, and "investigation" must be treated as a general term. Section 157 of the Code of Criminal Procedure directs an investigation by the police when a cognizable case is reported, and such investigation is doubtless preliminary to a proceeding before a Court of justice.

It is true that no such proceeding may ever take place, because of the case reported being false, as in the present instance, but the same objection might apply to an inquiry by a Magistrate, and yet an inquiry is the kind of proceeding given as an illustration to explanation 2 of section 193, Penal Code.

Neither Mr. Mayne in his new work on the Criminal Law of India, nor Mr. Starling in his edition of the Penal Code, nor any other commentator apparently, has discussed the matter from this point of view, and the cases in the reports, which, as already observed, do not deal with it either, have simply been accepted as disposing of the question. It cannot be said, therefore, that there is any distinct authority on the particular point under consideration. Under these circumstances the best and safest course appears to be to follow the guidance of the principle of interpretation which has thus been explained in an English case: "The rule of law, I take it, upon the construction of all statutes,.....is, whether they be penal or remedial, to construe them according to the plain, literal, and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evident absurdity." *Att. Gen. v. Lockwood* §.

Or, as it has been put in another case: "We ought to apply to this case what is called the golden rule of construction, namely, to give an Act of Parliament the plain, fair, literal meaning of its words, when we do not see from its scope that such meaning would be inconsistent, or would lead to manifest injustice." *Mattison v. Hart*, ||

* Cause (m) section 4, Code of Criminal Procedure, 1898.

† Clause (k) section 4, Code of Criminal Procedure, 1898.

‡ Clause (l) section 4, Code of Criminal Procedure, 1898.

§ 9 M. and W., 378.

|| 23 L. J. C. P., 108.

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This is one of the cardinal and most important rules of construction, and if it be applied to explanation 2 of section 193, Penal Code, and the plain meaning of the words be taken, those words must be held to include an investigation by the police made as directed by law.

The definition of "judicial proceeding" in the Code of Criminal Procedure is intended for the purposes of that Code, and it does not appear that it could be properly extended beyond the Code so as to modify the provisions of the Penal Code by mere implication. The District Magistrate has omitted to enter in the charge in so many words that the perjury was committed in a stage of a judicial proceeding, but he has specified the police investigation in which the false statement was made. He has also founded the charge on certain precise words said to have been used by the accused, which for the reasons mentioned above have not been distinctly proved, but the real gist of the charge is that the accused, in the course of the investigation, falsely stated that an attack had been made on him by dacoits, and of this there is sufficient evidence. I do not think, therefore, that the accused has been materially prejudiced in his defence, so as to render it necessary to order a re-trial.

The Court of Session has taken exception to the two charges being tried together, as the two offences committed did not form the same transaction within the meaning of section 235 (1), Code of Criminal Procedure. In strict logic this is correct, but strict logic is not applicable to all the provisions of the law, which has to be adapted to the common conditions of life. The word "transaction" is not used in a technical sense in section 235, but according to its ordinary meaning, which is "that which is done, an affair," and illustration (*) to the section gives an instance of two offences not so closely connected as the present as constituting the same transaction.

Here the two offences committed were really part and parcel of each other, so that it would be difficult, if not practically impossible, to separate them, and there was no good reason why they should not be tried together. This close connection may be taken into consideration with reference to the measure of punishment. There was really only one crime, though its execution split into two branches. Even if the offence of Criminal breach of trust should be brought under section 409, and not 406, Penal Code, as doubtless it should, the aggregate sentence appears unnecessarily severe. Upper Burmans have not had time yet to learn to comprehend the enormity of the kind of dishonesty devised and practised on this occasion, and it is understood that no actual loss of revenue has been caused to the State.

The sentence on each charge is accordingly reduced to rigorous imprisonment for one year and a half, or a total of three years.

* 23, L. J. C. P., 108.

Criminal Procedure—164.

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Before G. D. Burgess, Esq., C.S.I.

NGA MYAT KYAW v. QUEEN-EMPRESS.

Code of Criminal Procedure, 164—Confession not to be recorded unless made voluntarily—Oral confession to Magistrate—No provision for admission in evidence of confession not recorded in compliance with law.

*Criminal appeal
No. 124 of
1897.
November
22th.*

APPEAL.

A Township Magistrate who took a prominent part in the investigation of an offence, abstained from proceeding under the provisions of section 164, Code of Criminal Procedure, and gave evidence of an oral confession by accused obtained after various sorts of pressure.

The excuse he gave before the committing Magistrate was:—

“On the 8th the police brought Myat Kyaw to me to have his confession recorded, but I would not record it as accused would not give his confession according to law. By ‘according to law’ I mean that his confession was not deliberate. The law requires that a confession must be voluntary, and accused did not wish to make a voluntary confession.”

No notice of this admission was taken at the trial by the Court of Session.

Pointed out—That this was a serious omission; that there is no provision for the admission in evidence of a confession to a Magistrate unless it is recorded in the manner prescribed by law; and that, even if such confession may, under special circumstances, be proved otherwise, the confession of accused in this case was shown to have been made under inducement which deprived it of value.

Sentence reversed accordingly.

JUDGMENT OF COURT OF SESSION.

“THE accused have been committed to this Court, charged with committing robbery, and, while committing robbery, with having caused grievous hurt and attempt to murder one of the complainants.

“The facts of the case are that on the night of the 2nd of July 1897 the two complainants, Manipuri Brahmins or Pônna, were asleep in the *sayat* near the *kyaung* at Myegédaung, and were suddenly attacked and beaten with sticks and cut over the body with a *da*. The complainant, Saya Kyaw, was beaten all over the body with a stick, while the second complainant, his son Sein Da, received several blows with a *da*, one gave a bad wound below the chin and very nearly cut the throat, another severed a joint of the little finger of the left hand, and there were several other wounds. These wounds necessitated the complainants’ treatment in hospital for over 40 days, during which time they were unable to carry on their duties. In addition to inflicting the wounds on the complainants, the robbers attempted to throw the complainant Sein Da, into a well, but the alarm given by the first complainant brought out the villagers and the robbers decamped, carrying off a lot of brass cooking-pots and pans, etc., and Rs. 47. On making inquiries it appeared that the complainant Sein Da, a fortune-teller, had a quarrel with Myat Kyaw, the first accused, a local fortune-teller whose *Sadas* he asserted were wrong; following up this clue, Myat Kyaw was subsequently arrested and admitted he had attacked the complainants with the other two accused, and pointed out where the *da* used in the attack was secreted. The other two accused were arrested and sent up for trial.

“The accused plead ‘Not guilty.’ The first accused asserts that he was maltreated and so induced to make the admissions and statements he did implicating the other accused. He asserts now he was not present, and in his defence has called

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some evidence to prove an *alibi*. Against the second accused there is only the statement of the first accused implicating him and certain evidence to show that he returned to his village at midnight on the night of the attack, and some very suspicious evidence as to what he and third accused said in jail while under trial and made offers to pay the first accused if he did not implicate them and took the punishment himself.

“Against the third accused the evidence consists in—

- (1) The original statement made by the first accused implicating him.
- (2) That the tracks of two if not three men were traced.
- (3) That the accused made admissions which showed he knew something of the affair, as he said E Maung was consulted and that first accused had consulted him to attack.
- (4) That it is proved he came back after midnight on the night of the attack.
- (5) That his actions prior to the robbery had been very suspicious, and it is shown that the three accused were seen together or in twos at different times on the day of the attack.
- (6) That money was offered to first accused to not implicate him.

“As regards the first accused, Myat Kyaw, he fails entirely to prove any maltreatment; the witnesses he calls on this point deny this *in toto*. He first made out he was beaten all over, and on my asking him to show any hurt, showed an old swelled finger-joint and said this was the only hurt. He is clearly telling an untruth. His explanation as to how he came to know of the *da* being in the jungle hidden is manifestly improbable and false. It is not likely a man would hide a *serviceable da* if he found one in the way he states, and it is remarkable that he of all men should have hidden a *da* when it is clear that he had had a serious quarrel with the complainant and was suspected of this attack. There is the evidence of his brother to show he had this *da* with him at his house. It is evident from the evidence that the first accused was very much annoyed with what the complainant, Sein Da, had said. He fails entirely in proving the *alibi*. His witnesses do not show that he could not have left his village that night. I think, therefore, that there is ample evidence to corroborate his admissions to the investigating Magistrate and that there can be no doubt that he committed the offence with which he is charged. I have not alluded to E Maung's evidence as E Maung is a doubtful sort of witness; he has only recently been released from jail, and it seems curious that the first accused should have consulted him to attack the complainants. At the same time I am rather inclined to think that possibly E Maung was one of the three men who are supposed to have been in the attack for reasons which will be apparent later on. As regards Maung Tun, the second accused, I have grave doubts as to his having been in the attack.

“The evidence against him, as already pointed out, consists of—

- (1) The first accused's statements implicating him.
- (2) The evidence showing that he and first accused had been seen together on the day of the attack and that third accused had been seen with him.
- (3) The fact that he came in late that night to his village.
- (4) That a *lóngyi* was found with stains like blood on it.
- (5) The statements of the prisoners confined with him, who assert he offered first accused Rs. 100 not to implicate him.

“Of these five grounds against the accused the evidence as to accused's coming in late at night is, I think, open to some suspicion. The accused asserts the witness Tha Dun is a relative of the other witness, who has admitted he has quarrelled

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with him. Tha Dun is not corroborated by his fellow watchman. It may be true, but I think if a man comes to the village gate at night, it is certainly most likely the fellow watchman would be awakened before the door was opened. Then as regards the *lóngyi* there is nothing to show the stains are blood stains; they look like oil stains: and the statements of the prisoners confined with the accused are, I think, made up and by no means worthy of credit. I do not believe this evidence, so that practically all the evidence we have is the statement of the first accused against him corroborated by the fact that the first, second, and third accused had been seen together the day before the attack. This evidence is, I consider, insufficient in his case. It amounts perhaps to strong suspicion, but falls short of proof. I consider the second accused Maung Tun should have the benefit of the doubt."

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"As regards the third accused, it is perfectly clear that the accused did come back late that night. He has not accounted for his absence satisfactorily. He asserts he was out searching for a bullock; but he lost this bullock long before and there is no proof that he searched this day, and it seems highly improbable. Then, again, it is clear that the accused did assert some knowledge of the attack, for he told the Magistrate at first E Maung was in it, and on this E Maung was examined. Then again in the Lower Court he admitted that Myat Kyaw, first accused, had consulted him about the attack, but he refused and that he then consulted E Maung. He denies this is true now, but cannot explain why he made the statements he did, at least satisfactorily. The tracks led to near the village of the accused.

"I think these are sufficient grounds for believing the first accused's original story that the third accused was concerned with him, and I must find that he was in the attack.

"The offence was a very serious one. The complainants was very severely handled. The first accused was clearly the ringleader and the only one who had a motive apparently for committing the offence. I will therefore make a difference in the punishment I award to the first and second accused.

"The Court finds that Nga Tun, son of Nga Tek, is not guilty of the charge specified against him; he is accordingly acquitted and set at liberty.

"The Court finds that Nga Myat Kyaw and Nga Shwe Zin, sons of Ko Shwe U and Ko Tek, are guilty of the offence specified in the charge, namely, that they on or about the 2nd July, at Myegedaung, have committed the offence of robbery with grievous hurt and attempt to cause death, and have thereby committed an offence punishable under sections 394—397 of the Indian Penal Code; and the Court directs that the said Nga Myat Kyaw do suffer transportation for life, and you Nga Shwe Zin do suffer ten years' rigorous imprisonment."

JUDGMENT IN APPEAL.

It would have been convenient if the Public Prosecutor had been instructed to appear in this case as there is a point in it which might have been usefully dealt with after argument.

The Magistrate who took a prominent part in the investigation of the offence says that the appellant confessed to him, though he did not proceed under section 164, Code of Criminal Procedure, and the Court of Session seems to have accepted the statement of the alleged confession in evidence without question. But it was requisite to show how any such statement was admissible as evidence.

The law makes the most careful provision in the section mentioned as to the way in which a magistrate must conduct himself in such circumstances. He must show all the questions put to and answers given by the accused, he must put them down in writing in the exact

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words, he must satisfy himself that the confession is voluntarily made, and he must formally certify to these things under his own hand.

The object of the law is of course to ensure that what professes to be a confession shall be freely made and shall be put on record in the very language used by the person making it, so that there may be no mistake as to the precise meaning.

Now, the course taken by the Court of Session was to render all these jealous precautions vain and illusory, and, if that can be done in one case, why then to be sure it can be done in another. And so, when a Magistrate finds it inconvenient to comply with the provisions of section 164, all he has to do is to say to himself: "O, never mind that troublesome section. I'll get the man's confession and prove it orally!"

Does it seem likely that it was the intention that the precise procedure laid down might be treated in this way? What would be the use of enacting such provisions if they could be evaded or not at pleasure?

Yet this is the kind of thing that has happened here.

The Magistrate said—"It did not strike me to take down the accused's statement."

The Court of Session should clearly not have accepted an excuse of that lame and impotent sort from an officer who has been a Magistrate for years.

Moreover, the Court of Session had before it the Township Magistrate's deposition in the Court of the committing Magistrate, and as an impartial tribunal it was in duty bound to question the witness on the admissions which he made at that time.

Those admissions were sufficiently remarkable to attract the Court's attention.

The Township Magistrate deposed:—

"On the 8th the police brought Myat Kyaw to me to have his confession recorded, but I would not record it as accused would not give his confession according to law. By 'according to law' I mean that his confession was not deliberate. The law requires that a confession must be voluntary, and accused did not wish to make a voluntary confession."

After a statement like that from the most important witness, I am at a loss what to say about the manner of the trial in the Court of Session.

The faculty for wonder has received too many shocks to allow me to say I am astonished.

Supposing that the alleged confession of Myat Kyaw could be proved apart from section 164—and it is conceivable perhaps that circumstances might occur under which a confession to a Magistrate could be proved otherwise—it is obvious that the value of such a confession must be next to nothing.

The appellant was not in a position to establish his allegations of physical ill-treatment, but it is clear that a good deal of pressure of

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some kind was put upon him. He was suspected of being concerned in the offence, and, when he refused to acknowledge any share in it, he was treated as guilty, required to account for his time and movements, and harassed in various ways. NGA MYAT KYAW
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Finally the so-called confession was extracted by employing the Pakanngè *thugyi*, Po Myit, 20th witness for prosecution, who stood to appellant in the relation of master to man, *saya-tabyi*.

In his deposition at the committal enquiry the Magistrate said :—

"I asked Po Myit to try and get Myat Kyaw to tell the truth."

What did that mean? What could it mean under the circumstances, but the exercise of improper influence?

If the confession were obtained by means of an inducement forbidden by law, it would of course be inadmissible; but, assuming that the measures employed fell short of that, it is plain that a confession extorted in that way must be unworthy of reliance. The evidence of Po Myit as to what actually passed is also open to suspicion and must be received with considerable reserve.

The appellant, however, by direction of the Magistrate, pointed out a *da* concealed in the jungle. But that fact seems to go a very small way. Appellant explains how he found the *da* and buried it. He is contradicted by the 21st witness Myat Thin, his brother, who says appellant had the *da* at his house, but there have been quarrels between the two men. Anyhow the fact is consistent either with guilt or innocence. There is nothing special to connect this weapon with the crime. Burmans are in the habit of burying things as a safe way of keeping them. There would be no apparent object in concealing the *da* because it had been used in the crime. It could have been taken home and kept without suspicion.

The other facts proved are inconsistent with the confession. The appellant tried to show where the sticks said to have been employed were cut, and the attempt failed.

His story was that three men were engaged, but the footsteps of two only were found, a discrepancy which is rather striking. The motive for the crime is found in a quarrel about horoscopes between Myat Kyaw and one of the prosecutors. The motive appears inadequate, and the evidence relating to the affair and its consequences is contradictory or unsatisfactory.

Other evidence refers to the alleged planning of the crime. It is of the usual type, uncorroborated and intrinsically worthless, and the Court of Session has declined to credit some of it. There is of course ground for some suspicion against both accused-appellants, but there is not sufficient proof, and there are even difficulties in the way of seeing how the story of the commission of the offence by them could possibly be true. But the whole case depends upon the confession of Myat Kyaw, and, unless this is free from reasonable doubt of its truth and genuineness, a conviction cannot stand. It is not only not free from such doubt, but is open to very grave suspicion.

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The case of appellant Shwe Zin depends on that of his fellow-accused. His own confession, afterwards withdrawn, extended to a statement of an invitation from Myat Kyaw to take part in an attack on prosecutors. His return to his village late at night might or might not be connected with the affair.

The evidence against both appellants is neither trustworthy nor sufficient, and the conviction and sentence must be reversed as to both.

The Court of Session should call upon the Township Magistrate for an explanation of his proceedings and forward it, with its own remarks and those of the District Magistrate.

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Before G. D. Burgess, Esq., C.S.I.

NGA PO SIN v. QUEEN-EMPRESS.

Mr. H. M. Lütter, Government Prosecutor—for the Crown.

Criminal Procedure, 164, 364-533—Confession—Mode of recording—Defective procedure in—Remedying of—Duty of Court in respect of—Accused committed for trial under 396, I. P. C., but wrongly convicted under 395 and 302 without amending the charge.

*Criminal Appeal
No. 36 of
1897.
April
26th.*

Of the five appellants two were sentenced to death and three to transportation for life for committing a dacoity in which three hawkers were robbed of their goods and killed. The confessions of the two accused sentenced to death were not recorded in compliance with the provisions of sections 164 and 364, Code of Criminal Procedure, but merely in narrative form without showing questions and answers, and it was the duty of the Court of Session to have taken evidence in the matter under section 533.

These accused, however, made subsequent confessions, though less self-inculpatory, before the Committing Magistrate.

Held—As to the admissibility of the first confessions as they stood without the evidence which ought to have been taken under section 533, Code of Criminal Procedure, to cure the defect in the form of record that it did not seem at all likely that the error had injured the accused as to their defence on their merits. In three cases in the Calcutta High Court Reports confessions made in simple narrative form were allowed in evidence where it appeared that the accused had not been prejudiced by failure to comply strictly with the law.

It was conceivable, of course, that under certain circumstances such irregularity might be very prejudicial to the, accused affected by it, and the Magistrate who committed it incurred grave responsibility.

It would be possible, for instance, that the whole story in a confession might be constructed by putting questions to the accused which would suggest every circumstance and particulars entered in the statement, and in such a case the omission of the questions from the record would have the false and misleading effect of making the concoction appear as a spontaneous and genuine effusion from the accused's own lips.

But it was not understood that there was any intention here of making any imputation of that sort, about which there would be no inherent likelihood whatever.

Under the Criminal Justice Regulation, Schedule XV, it is only where a failure of justice has been occasioned that interference on account of an irregularity of procedure is requisite, and there was no symptom here of any failure of justice through this defect.

The Court of Session had departed from the charge on which the accused were tried under section 396, Indian Penal Code, and had convicted under sections 395 and 302, but for no sound reason apparently. Before convicting under section 302 the Court should have amended the charge, which it had not done.

The Court considered that the hawkers were murdered to get rid of their evidence, and not in the course of the commission of the dacoity, which had already been committed.

But this seemed clearly to be an entire misapprehension both of fact and law. The transaction was obviously a continuing one and was not completed till the owners of the property had been killed. The property was retained beside them till they were killed and it could be carried off in safety.

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The alteration made by the Court of Session was not justified and was now set aside, and all the accused appellants were instead convicted as charged of dacoity in which murder was committed under section 396, Indian Penal Code.

Even if the conviction under section 302 were right, then all the accused ought to have been similarly convicted, for they were all guilty of the same offence under the provisions of section 114 of the Penal Code.

The conviction being corrected, the appeals were otherwise dismissed.

References:—

I. L. R., 7 Cal., 616, 618.

I. L. R., 14 Cal., 539.

1, U. B. R., 1892-96, page 148.

THIS appeal and the four following appeals arise out of the same original case and may be taken together.

The first question for consideration is whether the *corpus delicti* is made out. Three hawkers went out with their wares about the beginning of *Wazo*, or about June last year, and have never yet returned home. Enquiry has been made for them, and they have been traced to the neighbourhood of the place where the offence charged in this case is said to have been committed, and no further. The case for the prosecution is that they have been robbed and murdered.

Some human bones have been found, one of them exhibiting sign of a wound, and beside them a rope, such as these pedlars used for tying their packs, and a piece of a garment similar to what was worn by one of the men.

Somewhere near the spot were also found four combs such as the hawkers had among their stock.

And betel-boxes have been discovered in the course of the proceedings, and a spoon, such as were taken by the missing men for sale.

The cumulative effect of these circumstances seems sufficient to establish the identity of these three missing hawkers who, according to the confessions of two of the appellants, were seized, robbed, and killed.

The two accused, who have confessed, Po Sin and Kun Bu, disposed of several betel-boxes during the rains, a month or two after the event apparently, and a spoon similar to spoons which one of the hawkers had with him was found in Kun Bu's house.

These men may therefore be believed when they say that they got such property in the transaction. The bones were found by the appellant Kun Bu pointing out the spot. Kun Bu and Po Sin made two confessions, one before the District Magistrate under section 164, Code of Criminal Procedure, and the other under section 364 before the Committing Magistrate. At the trial they appear to have both adhered to the latter account, but their examination in the Court of Session ought to have been much more distinct and to the point.

It is not very clear what position they want to take up in appeal, but they repudiate their confessions before the District Magistrate as having been extracted from them after corporal ill-treatment in the middle of the night by false and delusive misrepresentations and inducements.

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As these confessions are recorded in a manner which does not comply with the provisions of section 364, Code of Criminal Procedure, although they were taken by a District Magistrate, it was the duty of the Court of Session to take evidence under section 533, Code of Criminal Procedure.

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The requirements of the section are obligatory.

In the first confessions Po Sin and Kun Bu related the story of the dacoity on the three hawkers, and described themselves as each killing one of those unfortunate men. Besides themselves they implicated the other three appellants, Nga Yan Shin, Nga Chit Su, and Nga Chok and other men, making altogether a band of eight.

In their second confessions Po Sin and Kun Bu greatly reduced the prominence of their own part in the dacoity, assigning to themselves merely the subordinate business of bearing and looking after the booty, while the other men concerned led away the victims to slaughter. They bring down the number of dacoits including themselves to five, and they leave out all mention of the other accused in the case, substituting the names of two entirely new men and retaining only one name out of the original eight besides their own.

There are two reasons for preferring the first story to the second as the more probably true of the two.

The second story was due to after-thoughts and is sicklied over with the pale cast of thought, thought partly for themselves and partly for their friends, time having brought reflection and the opportunity for the working of the usual influences and motives. In the next place the later narrative carries on its face a palpable improbability amounting to practical impossibility, for it represents the actual attack on the hawkers and their subsequent confinement and assassination as having been effected by only three men. Thus to pit three men against other three men is a manifest absurdity in the tale and a thing quite inconsistent with the prudence and caution of the Burman dacoit and his accustomed care of his own personal safety. The original account of eight men setting upon three is much more probable and like the natural habits of the species under description.

There can be no doubt that the original confessions made very shortly after the arrest of the accused were the more spontaneous and more unsophisticated of the two and consequently entitled to the greater credence.

As to Kun Bu and Po Sin themselves there are their confessions acknowledging, up to the time of the trial and perhaps even now, that they took at least some share in the dacoity, and the confessions are corroborated by their possession of property, the quality and quantity of which indicated its acquisition by means of the dacoity and the possession of which is in no other way accounted for, and, in the case of Kun Bu, further corroborated by his showing where the remains of the murdered men were to be found.

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With respect to the other three appellants, Yan Shin, Chit Su, and Nga Chok, there is the evidence of the seventh witness for the prosecution, Maung Waing, that in the month of *Wazo* and in the neighbourhood of the scene of the dacoity he saw these three men with something in their hands following up three hawkers, and there is the evidence of the eighth witness, Min Maung, that in the same month and about the same spot he saw a group of some ten persons, in which were certain hawkers with their hands tied behind their backs, and in which he recognized Yan Shin, Chit Su, and Nga Chok.

This witness at first denied that he had told any one of the sight he had seen, but he afterwards said that he had at once informed the *Ywagaung* Maung Bauk, and explained that the *gaung* instructed him to leave it to him to tell the Court about this matter.

It appears that it was through Maung Bauk that the case was brought to light in a roundabout and anonymous manner, because of the fear entertained by the people of the dacoits, and there is nothing else against the witness Min Maung, to impeach his credibility.

In addition to this direct evidence against these three appellants there has to be taken into consideration the statements in the first confessions of their co-accused, Po Sin and Kun Bu, implicating them in the commission of the offence.

As to the admissibility of these first confessions as they stand without the evidence which ought to have been taken under section 533, Code of Criminal Procedure, to cure the defect in the form of record, it does not seem at all likely that the error has injured the accused as to their defence on the merits.

In three cases reported in the Calcutta High Court Reports † confessions recorded in simple narrative form were allowed in evidence when it appeared that the accused had not been prejudiced by failure to comply strictly with the law.

It is conceivable, of course, that such irregularity might be very prejudicial to the accused affected by it, and the Magistrate who commits it incurs grave responsibility.

It would be possible, for instance, that the whole story in a confession might be constructed by putting questions to the accused which would suggest every circumstance and particular entered in the statement, and in such a case the omission of the questions from the record would have the false and misleading effect of making the concoction appear as a spontaneous and genuine effusion from the accused's own lips.

But it is not understood that there is any intention here of making any imputation of that sort, about which there would be no inherent likelihood whatever.

* 1, U.B.R., 1892-96, p. 148.

† I.L.R., 7 Cal., 616, 618, and I.L.R., 14 Cal., 539.

Criminal Procedure—164, 364,—533.

Under the Criminal Justice Regulation, Schedule XV, it is only where a failure of justice has been occasioned that interference on account of an irregularity of procedure is requisite, and there is no symptom here of any failure of justice through this defect.

NGA PO SIN
v.
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The original confessions being admitted then, all the evidence when taken together seems to be enough to establish with reasonable certainty the guilt of all the five men who have been convicted.

The Court of Session has departed from the charge on which the accused were tried under section 396, Indian Penal Code, and has convicted under sections 395 and 302, but for no sound reason apparently. Before convicting under section 302 the Court should have amended the charge, which it has not done.

The Court considered that the hawkers were murdered to get rid of their evidence and not in the course of the commission of the dacoity, which had already been committed.

But this seems clearly to be an entire misapprehension both of fact and law. The transaction was obviously a continuing one, and was not completed till the owners of the property had been killed. The property was retained beside them till they were killed and it could be carried off in safety.

The alteration made by the Court of Session was not justified and is now set aside, and all the accused-appellants are instead convicted as charged of dacoity, in which murder was committed, under section 396, Indian Penal Code.

Even if the conviction under section 302 were right, then all the accused ought to have been similarly convicted, for they were all guilty of the same offence under the provisions of section 114 of the Penal Code.

The Court of Session has passed a sentence of death on the accused Po Sin and Kun Bu, and on the other accused a sentence of transportation for life.

There was no good reason for making any such distinction, and it is a question whether, if the convictions are to stand, punishment should not be equalized by enhancement. But the appellants are not represented at the hearing of the appeal, and the learned Government Prosecutor does not press this point, and besides it might perhaps be advisable, before dealing with any of the appellants in that way, to give an opportunity for further enquiry with respect to one or more of the matters which have been mentioned above as open to objection of one kind or another, and the delay which that would entail is, if not absolutely necessary, to be avoided.

The Court of Session has made a wholesale transfer of certain depositions from the committal proceedings to its own record, ostensibly under the provisions of section 288, Code of Criminal Procedure, but without any real warrant from those provisions for the course followed.

Criminal Procedure—164, 364,—533.

NGA PO SIN
v.
QUEEN-EMPRESS.

It has also contravened the provisions of the Evidence Act in regard to the admission of hearsay statements and statements made to the Police. But after the elimination of all these inadmissible materials from the record there still remains ample evidence on all the main points requiring proof to justify the conviction of all the appellants if that evidence is trustworthy, and, in my opinion, the Court of Session was right in accepting the evidence as credible.

The crime was of the savage cold-blooded type which was common enough in the days of the annexation, but which has fortunately almost disappeared for several years past, and deserves to be punished with the utmost rigour of the law.

The appeals of all five appellants are dismissed.

Criminal Procedure—179.

Criminal Procedure—179.

Before H. Adamson, Esq.

QUEEN-EMPRESS v. NGA MÔN GAING.

*Criminal Procedure, 179—Accused triable in district where act is done or where consequence ensues.**Criminal Revision
No. 498 of
1899.
June
19th.*

Held,—That the mere fact that a person on whom hurt had been inflicted in one district was treated in a hospital in another district would not render the offence triable in the latter district.

THE offence was committed in Minbu district and tried in Magwe district. The District Magistrate of Magwe held that the offence was triable in that district under the provisions of section 179, Criminal Procedure Code, and that it was similar to the case in illustration (b) under that section. But the point in illustration (b) is that the consequence which ensued, namely, the fact that the injured person was unable to follow his ordinary pursuits during a period of twenty days was an ingredient of the offence, namely, grievous hurt. In the present case there was no grievous hurt, and the mere fact that a person on whom hurt had been inflicted in one district was treated in a hospital in another district would not render the offence triable in the latter district. The offence was, however, triable in Magwe district under the provisions of section 183, Criminal Procedure Code, as it was committed in the course of a journey into the Magwe district. There is no call for interference.

Criminal Procedure—190 (1) (b).

Criminal Procedure—190 (1) (b).

Criminal Revision
No. 163 of
1897.
March
16th.

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS *v.* JARGISSA.

Criminal Procedure Code 190 (1), (b)—Police Report, Meaning of—

This was a prosecution under section 122 (1) of the Railways Act, 1890, for unlawfully entering upon a railway.

The prosecution was instituted on a written application from the officer in charge of the railway police-station for a summons, and summons was issued without examination of the complainant.

On reference to the District Magistrate it was reported by him and by the Sub-divisional Magistrate who tried the case that railway cases are entertained under section 191* (b) of the Code of Criminal Procedure.

Held,—that this could not be correct in view of the ruling laid down in 1, U. B. R., 1892-96, page 28, the report under section 122 of the Railways Act not being a police report. Section 122 of the Railways Act is not one of those mentioned in section 131 which confers the power of arresting without warrant for certain offences under the Act, and the procedure applicable to non-cognizable cases must be followed.

References :—

- 1, U. B. R., 1892-96, page 28.
- 1, U. B. R., 1892-96, page 328.

THE proceedings are not very intelligible, but the District Magistrate has already given instructions to the Subdivisional Magistrate.

It should be reported under what provision of the Code of Criminal Procedure cases like this are entertained. Apparently the case was not treated as a complaint as complainant was not examined.

If the case were taken up under section 191* (c), the jurisdiction of the Magistrate is liable to be ousted on the objection of the accused, which might be a source of inconvenience.

There ought to be a uniform rule for the treatment of such cases.

* * *

Read reports of Subdivisional Magistrate and District Magistrate that cases of this kind are entertained under section 191* (b) of the Code of Criminal Procedure. This opinion and practice are unsustainable in face of the ruling on the subject laid down in the case of *Queen-Empress v. Ma Min Me* † repeated in the case of *Queen-Empress v. Nga Thaung* ‡ the report under section 122 of the Railways Act not being a police report. Section 122 of the Railways Act is not one of those mentioned in section 131 which confers the power of arresting without warrant for certain offences under the Act.

* [Section 190 of the Code of Criminal Procedure, 1898.]

† 1, U. B. R., 1892-96, page 28.

‡ 1, U. B. R., 1892-96, page 328.

Criminal Procedure—190 (1), (c).

Criminal Procedure—190 (1), (c).

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS *v.* NGA TA YOK PYU.

Criminal Procedure, 190 (1), (c) Magistrate not empowered under—Issue of summons by—under s. 61 of Stamp Act upon strength of sanction of Collector to prosecute under s. 69.

*Criminal Revision
No. 381 of
1897.
May
28th.*

In this case a Magistrate of the second class not empowered under section 190 (1), (c) of the Code of Criminal Procedure issued a summons under section 61 of the Stamp Act on receipt of the sanction of the Collector to prosecute given under section 69 without other material for taking cognizance of the offence.

Pointed out—That as the Magistrate was not acting under section 190 (1), (c) he must have been acting under clause (a) and, therefore, his procedure should have been regulated by the provisions of section 200, and he ought to have examined the complainant.

In this case a Magistrate of the second class not empowered under section 191 (c)* of the Code of Criminal Procedure issued a summons under section 61 of the Stamp Act on receipt of the sanction of the Collector to prosecute given under section 69.

The Magistrate was not acting under clause (b) of section 191,* Code of Criminal Procedure, because there was no Police report.

He must, therefore, have been acting under clause (a) on complaint, and the District Magistrate is unable to point out any other provision of law bearing on the point. That being so, the Magistrate's procedure should have been regulated by the provisions of section 200, Code of Criminal Procedure, and he ought to have examined the complainant.

A Magistrate cannot take cognizance of an offence except as empowered by law in that behalf.

* [Section 190 of the Code of Criminal Procedure, 1898.]

Criminal Procedure—190 (1), (c), 191.

Criminal Procedure 190 (1), (c), 191.

*Criminal Miscel-
laneous
No. 2 of
1900.
March
19th.*

Before H. Thirkell White, Esq., C.J.E.

NGA PAING, NGA LU WA, MI NET TE *v.* QUEEN-EMPRESS.

Mr. R. C. Swinhoe—for applicants.

A Magistrate having taken cognizance of an offence may deal with any person supposed to be concerned in it.

A Magistrate took cognizance on complaint of certain offences alleged to have been committed and issued processes for the appearance of three accused persons.

After proceeding some way in the enquiry, he submitted the record to the District Magistrate under section 346, Code of Criminal Procedure. The District Magistrate after recording some evidence was of opinion that the present applicants were alleged to be concerned in the offences under trial and added them as accused persons. This Court was moved to quash the proceedings and direct a retrial before another Magistrate or the committal of the accused to the Court of Session on the ground that the District Magistrate took cognizance of the offences alleged to have been committed by the present applicants under section 190, sub-section (1), clause (c), of the Code of Criminal Procedure, and that he was bound by section 191 of the Code to give them the option of being tried by another Court.

Held,—that the terms of section 191, Code of Criminal Procedure, are imperative, and that disregard of them is a material defect which invalidates the proceedings, not a merely formal irregularity of procedure.

Held,—that the District Magistrate did not take cognizance of the offences under clause (c) of sub-section (1) of section 190 of the Code of Criminal Procedure and that he was not debarred from trying the case.

References:—

1, U. B. R., 1897—1901, page 59.

4, Cal. Weekly Notes, page XLV.

I. L. R., 26, Cal., page 786.

In this case a Magistrate took cognizance on complaint of certain offences alleged to have been committed and issued processes for the appearance of three accused persons. After proceeding some way in the enquiry, he submitted the record to the District Magistrate under section 346, Criminal Procedure Code. The District Magistrate, after recording some evidence, was of opinion that the present applicants were alleged to be concerned in the offences under trial and added them as accused persons. This Court is moved to quash the proceedings and direct a retrial before another Magistrate, or the committal of the accused to the Court of Session, on the ground that the District Magistrate took cognizance of the offences alleged to have been committed by the present applicants under section 190, sub-section (1), clause (c) of the Code of Criminal Procedure, and that he was bound by section 191 of the Code to give them the option of being tried by another Court.

The case of this Court cited in argument and referred to by the District Magistrate, *Queen-Empress v. Mi Chin Ma** is not precisely apposite. In this case, the Magistrate had taken cognizance of

*1, U. B. R., 1897—1901, page 59.

Criminal Procedure—190 (1), (c), 191.

certain offences on complaint and formed the opinion that certain persons other than the accused before him were concerned in those offences. In *Mi Chin Ma's** case, the Magistrate took cognizance of an offence entirely different from that judicially before him.

NGA PAING
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There is no doubt that the terms of section 191, Code of Criminal Procedure, are imperative and that disregard of them is a material defect which invalidates the proceedings, not a merely formal irregularity of procedure. The only question in this case is whether the Magistrate should be held to have taken cognizance of the offences alleged to have been committed by these applicants under section 190, sub-section (1), clause (c), Code of Criminal Procedure.

There is a very recent case in the High Court at Calcutta which may be referred to for guidance. It is that of *Charu Chandra Das v. Norendra Krishna Chakravarti*.† The facts are stated in the report as follows:—

"On the 22nd June 1899 one Norendra Krishna Chakravarti lodged a complaint before the head constable of the Railway Police at Hoogly stating that four Babus had outraged the modesty of his wife, while he and his wife were sleeping in the verandah of the railway station and that one of them had struck him with a stick. At the time of the police enquiry the complainant identified one Bhut Nath Mukerjee, as having maltreated his wife. The head constable then sent up Bhut Nath Mukerjee to the Magistrate of Hoogly for trial, who made the case over to a Deputy Magistrate of Hoogly for disposal. The Deputy Magistrate tried the case, and convicted Bhut Nath of offences under sections 354 and 323 of the Penal Code and sentenced him to six months' rigorous imprisonment.

"At the trial, it appeared upon the evidence of one of the witnesses that Charu Chandra Das, the petitioner, and one Atul Krishna Chakravarti were concerned in the offence, with which Bhut Nath Chakravarti stood charged, and the Deputy Magistrate issued summons and instituted proceedings against Charu Chandra and Atul Krishna. That case was tried, and charges were framed against the petitioner under section 323 read with sections 114 and 354 read with section 114 of the Penal Code, and ultimately Charu Chandra Das was convicted of an offence under section 323 read with section 114, Indian Penal Code, and sentenced to four months' rigorous imprisonment.

"On appeal, the conviction was upheld by the Sessions Judge of Hoogly.

"The petitioner then moved the High Court and on his behalf it was contended that the Deputy Magistrate had acted without jurisdiction in proceeding under clause (c) of section 190 of the Code of Criminal Procedure, as he was not especially empowered by the Local Government to take cognizance of the case under the said clause of the said section. It was urged further that the Deputy Magistrate did not take cognizance of the case upon complaint or upon a police report, inasmuch as no complaint was lodged against Charu Chandra Das by Norendra Krishna Chakravarti, and the police did not send him up for trial."

The note of the ruling is as follows:—

Held,—that there having been a complaint made that some person or persons committed an offence, the Magistrate had cognizance of the offence, and if the evidence disclosed the fact that the petitioner was concerned in that offence, it was the duty of the Magistrate to deal with the evidence brought before him and to see

* 1, U. B. R., 1897—1901, page 59. | † 4 Cal., Weekly Note, page XLV.

Criminal Procedure—190 (1), (c) 191.

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that justice was done in regard to any persons who might be proved by the evidence to be concerned in that offence.

"That the Magistrate did not take cognizance of the offence under clause (c) of section 190 of the Code of Criminal Procedure, and that he was not debarred from trying the case."

I regret that a full report of the case does not appear to be available.

But as stated in the above extracts, the ruling seems to be precisely applicable to the present case. The District Magistrate had taken cognizance of offences on complaint. He saw reason to think that certain persons not already before him as accused persons were concerned in those offences. If the above ruling is to be accepted, he was justified in making them accused persons in the case.

It is obvious that for the purposes of the ruling, it is immaterial whether the applicants were concerned as principals or as abettors. I see no reason to decline to follow this decision. Another case in which a similar view was taken is *Jagat Chandra Mozumder v. Queen-Empress*.* The case in which a Magistrate takes cognizance of an offence extra-judicially of his own knowledge or on information received by him from some person other than a police officer seems to me to be clearly distinguishable from the case in which having duly taken cognizance of an offence on complaint or on a police report the Magistrate finds from the evidence before him that certain persons not already accused should be tried for being concerned in it. The distinction is clearly warranted by the exact words of the Code of Criminal Procedure.

I do not think there is any ground for the suggestion that the District Magistrate is precluded from trying the case against the applicants by section 556, Criminal Procedure Code.

Following therefore the rulings of the Calcutta High Court in the cases above cited, in which, if I may say so, I respectfully concur, I am of opinion that the District Magistrate is not precluded from proceeding with the trial of the applicants. The District Magistrate probably does not need to be reminded that no evidence taken in the case before these three persons were made accused can be considered against them.

The proceedings are returned with these remarks.

* I. L. R., 26 Cal., 786.

Criminal Procedure 190 (1) (c), 191, 487.

Criminal Procedure 190 (1) (c), 191, 487.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. MI CHIN MA.

Criminal Procedure 190, 191, 487—Offence—Cognizance of—taken on Magistrate's own knowledge—Accused entitled to be tried in another Court—Magistrate precluded from trying accused.

*Criminal Revision
No. 782 of
1898.
October
13th.*

The accused brought a false complaint against one Kan E, who was discharged. The Magistrate tried her under section 182, Indian Penal Code, for having "given false information before his own Court" and sentenced her to three months' rigorous imprisonment.

Held,—that the offence committed by the accused fell under section 211, Penal Code, and that an offence had also been committed under section 193, Penal Code.

Held,—also that as the Magistrate took cognizance of the offence, apparently, of his own knowledge under section 190, sub-section (1), clause (c), of the Code of Criminal Procedure, he was bound by section 191, Code of Criminal Procedure, to inform the accused that she was entitled to be tried in another Court.

Further, that as the offence charged against the accused was either committed before the Magistrate himself, or brought under his notice in the course of a judicial proceeding, he was absolutely precluded by section 487, Code of Criminal Procedure, from trying the accused.

THE accused Mi Chin Ma, preferred a complaint against a man named Kan E of having ravished her. The complainant was duly examined under section 200, Code of Criminal Procedure, and swore to the truth of the complaint. When the case came on for enquiry, the complainant retracted her statement and denied that Kan E had assaulted her in any way. The Magistrate discharged Kan E and proceeded "to deal with" Mi Chin Ma. He tried her under section 182 of the Indian Penal Code for having "given false information or lodged a false complaint before the Police and before the Court of the "Township Magistrate * * * " (*i.e.*, himself), and he sentenced her on conviction to suffer rigorous imprisonment for three months. Her appeal was rejected by the Sessions Judge.

The Magistrate committed more than one serious error. In the first place the offence committed by the accused falls under section 211, Indian Penal Code, and an offence was also committed under section 193, Indian Penal Code. She should have been tried under these sections and not merely under section 182, Indian Penal Code. Again, there was no sanction to the prosecution, either in respect of the information to the police or in respect of the complaint to the Magistrate. Sanction is required in either case before a Magistrate can take cognizance of an offence under section 182, Indian Penal Code. In the next place the Magistrate took cognizance of the offence, apparently, of his own knowledge under section 190, sub-section (1), clause (c), of the Code of Criminal Procedure. He was therefore in any case bound by section 191, Code of Criminal Procedure, to inform the accused that she was entitled to be tried in another Court. This he does not seem

Criminal Procedure—190 (1) (c), 191, 487.

QUEEN-EMPRESS
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to have done. Finally, and this is the most serious error of all, the offence charged against the accused* was either committed before the Magistrate himself or brought under his notice in the course of a judicial proceeding. He was therefore absolutely precluded by section 487, Code of Criminal Procedure, from trying the accused. In disobeying this explicit provision of the law, the Magistrate committed a grave irregularity, and his conduct merits severe censure. The sentence has been undergone, and it is useless for me to interfere. Moreover, in this particular case I am disposed to think that substantial justice was done. But this is no justification of the Magistrate's action. The accused was prejudiced by having the case tried by a Magistrate who was convinced of her guilt before he began the trial. It is for the sake of securing a fair and impartial trial in cases of this kind that section 487, Code of Criminal Procedure, has been enacted.

I note also that the form of the charge is wrong. The Magistrate has mixed up two distinct acts, the giving of false information to the police and the giving of false information to the Magistrate, which constituted separate offences, and for each of which a separate charge should have been framed.

Criminal Procedure—195, 487.

Criminal Procedure—195, 487.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS *v.* { 1. NGAPYU.
 { 2. TAUNGBO.
 { 3. KYIMAUNG.

Criminal Revision
No. 1032 of
1899.
March
19th.

The prohibition under section 487, Code of Criminal Procedure, extends only to contempts of authority of Magistrate as such.

In this case warrants were issued under section 337, Code of Civil Procedure, by a Township Judge for the arrest of certain judgment-debtors in civil execution cases. The judgment-debtors seem to have resisted or evaded arrest and the Township Judge submitted the case to the Subdivisional Magistrate and asked him to prosecute the judgment-debtors under section 174, Indian Penal Code. The Subdivisional Magistrate returned the case to the Township Court, with the intimation that the Township Magistrate could try the case himself, as a Magistrate was not debarred from taking cognizance of an offence under section 174, Indian Penal Code, committed against his own Court.

Held,—that under section 487, Criminal Procedure Code, a Magistrate cannot try an offence referred to in section 195, Criminal Procedure Code, when such offence is committed in contempt of his authority as such Magistrate, but that a Magistrate is not precluded from trying an offence referred to in section 195, Criminal Procedure Code, when the offence is committed in contempt of his authority, not as a Magistrate but as a Civil Judge.

Held also,—that section 174, Indian Penal Code, did not apply to the facts of the case and that the Magistrate should have proceeded under section 225-B, Indian Penal Code, on the complaint of the process-server.

References:—

- 1, Bom. H. C. R., 38.
- 2, B. L. R. (F. B.), 21.
- 5, B. L. R., 100.
- 8, W. R. A., 61.
- 1, U. B. R., 1892—96, page 53.
- 1, L. R., 12, All. 405.
- 16, Cal. 766.
- 18, Bom. 380.

I called for a report on this case on 17th October 1899. The report was not received till 26th February 1900. After making full allowance for difficulties of communications, absence of officers on tour and so on, I am bound to say that the delay was excessive and appears to be inexcusable. The District Magistrate is requested to see that such delay does not occur in future.

The Magistrate was misled by the note, in his annotated edition of the Penal Code. I have found the same note, to my surprise, in another commentary and have traced the case to which reference is made. It is the case of *Reg. v. Gagon Misser* * decided by the High Court at Calcutta in the year 1867. The learned Judges held that there was nothing in the law which forbade a Magistrate from taking cognizance

* 8. W. R. A.. 61.

Criminal Procedure—195, 487.

QUEEN-EMPRESS
v.
NGA PYU.

of an offence under section 174, Indian Penal Code, committed against his own Court. The case was decided under the Code of Criminal Procedure then in force, which was Act XXV of 1861. In that Code there seems to be no section exactly corresponding with section 487 of the present Code. The ruling could not, therefore, be regarded as authoritative in cases under the Code of Criminal Procedure, 1898. It was, moreover, explicitly overruled in *Queen v. Chandra Sekhar Roy*.^{*} I remark that when, as will be seen below, the law has been explained by this Court, the Magistrate is not justified in following either a note in a text-book or a ruling of another High Court.

Section 487 of the present Code directs that, except as provided in sections 477, 480 and 485, no Magistrate shall try any person for any offence referred to in section 195, when such offence is committed in contempt of his authority. None of the excepted sections applies in the present case. An offence punishable under section 174, Indian Penal Code, is an offence referred to in section 195, Code of Criminal Procedure. It is therefore clear that, under the present law, a Magistrate cannot try a person for an offence under section 174, Indian Penal Code, when such offence is committed in contempt of his authority as such Magistrate. This has already been ruled in *Queen-Empress v. Nga Eik*.[†]

A more curious question arises whether section 487, Code of Criminal Procedure, prohibits a Magistrate from trying a person for an offence referred to in section 195 when, as in the present case, the offence is alleged to have been committed in contempt of his authority not as a Magistrate but as a Civil Judge. On this point there are rulings of Indian High Courts. In the *Queen-Empress v. Sarat Chandra Rakhit*,[‡] it was held that a Sessions Judge could try a person for an offence when, as District Judge, he has under section 195, Code of Criminal Procedure, sanctioned the prosecution. The ground of the ruling was, in part at least, that as under section 472, Code of Criminal Procedure, the Sessions Judge could try an offence committed before him as Sessions Judge it would be inconsistent to hold that he could not try such an offence if committed before him as District Judge. The High Court at Bombay followed and applied this ruling in *Queen-Empress v. Raiji Daji*,[§] in which it was held that a Magistrate is not debarred from trying an accused person under section 174, Indian Penal Code, for disobedience of a summons issued by him in his capacity of Mamlátdár. The contrary view was taken in *Empress v. Sukahari*,^{||} by the Allahabad High Court. I think the more recent rulings may safely be followed, especially as the Code of Criminal Procedure has since been re-enacted, and in this respect section 487 has not been altered or explained. The Township Magistrate was therefore competent to try the offence of contempt of his authority as Township Judge.

^{*} 5, B. L. R., 100.

[†] 1, U. B. R., 1892—96, page 53.

[‡] I. L. R., 16, Cal. 766.

[§] I. L. R., 18, Bom. 380.

^{||} I. L. R., 12, All., 405.

Criminal Procedure—195, 487.

A further question arises in this case whether section 174, Indian Penal Code, applies to the facts. It has been held that section 174 does not apply to the case of a defendant escaping from custody under a warrant in execution of the decree of a Civil Court (*Reg. v. Sandar Pathu*,*) nor does the case of *Queen-Empress v. Bhagai Dafadar*,† seem to me to countenance a different view. In the present case the accused are said to have wilfully disobeyed warrants of arrest issued under section 337 of the Code of Civil Procedure. It is not quite clear what they actually did. But if they offered resistance or illegal obstruction to their apprehension under such warrants the case, it seems, would fall more properly under section 225-B, Indian Penal Code. It is difficult to see how a warrant directed to a process-server ordering him to arrest a person can be construed as being a "summons, notice, order, or proclamation" binding the person to be arrested to attend at a certain time and place. I am of opinion therefore that section 174, Indian Penal Code, is inapplicable, and that the Magistrate should have proceeded under section 225-B, Indian Penal Code, on the complaint of the process-server. In that case no sanction would be necessary.

QUEEN-EMPRESS
v.
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* 1, Bom. H.C.R., 38. | † 2, B.L.R. (F.B.), 21.

Criminal Procedure—227.

Criminal Procedure—227.

Criminal Revision
No. 856 of
1898.
October
14th.

Before H. Thirkell White, Esq., C.I.E.
NGA O v. QUEEN-EMPRESS.

Criminal Procedure 227—Charge—Cancelling of—under one section—and substitution of another—not warranted by law.

In this case after the complainant was examined, and after hearing argument the Magistrates held that the charge which was originally framed against the accused could not stand. This charge was crossed out and another under a different section substituted.

Held—that the Magistrate's action in cancelling the charge under one section and substituting for it a charge under another section was a procedure not warranted by section 227, Code of Criminal Procedure.

In this case the applicant Nga O, with three others and a fourth who does not seem to have been brought before the Court, was prosecuted for various offences, under sections 392, 148, and 352 of the Indian Penal Code, and for abetment of an offence under the Arms Act. The District Magistrate, after examining only some of the witnesses named for the prosecution, discharged the second, third, and fourth accused, and charged the first accused under section 392, Indian Penal Code. The complainant was then cross-examined and, after hearing argument, the Magistrate held that the charge of robbery could not stand. He therefore crossed out the charge under section 392, Indian Penal Code, and substituted for it a charge under section 352, Indian Penal Code. The offence under section 352 was then compounded and the accused was acquitted.

The District Superintendent of Police then preferred an appeal (so called) to the Sessions Judge, through the District Magistrate. The memorandum submitted by the District Superintendent of Police is a long and contentious document containing much irrelevant matter. It should have been confined to a temperate recital of relevant facts; if, which seems doubtful, the District Superintendent of Police had any *locus standi* for moving the Sessions Judge in the matter. The Sessions Judge called for the case and, after giving the accused an opportunity of showing cause, directed further enquiry into the charges against all of them. He held that the Magistrate's action in altering the charge was not warranted by law, that there had been no acquittal of the accused under section 392, Indian Penal Code, and that the Magistrate's order was equivalent to a discharge.

I am asked to set aside the order of the Sessions Judge on the grounds that it is not an order which can legally be passed under section 437, Criminal Procedure Code, as the accused was not discharged, that the Magistrate's alteration of the charge was regular and authorized by section 227, Code of Criminal Procedure, and that there is no reason for any further enquiry into the case.

* * * * *

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I agree with the Sessions Judge in thinking that the Magistrate's action in cancelling the charge under section 392 and substituting for it a charge under section 352, Indian Penal Code, was a procedure not warranted by section 227, Criminal Procedure Code. That section certainly in terms authorizes the Court to alter any charge; and it has been argued that the Magistrate's procedure was within the letter of the law. I have no doubt that it was not in accordance with the spirit of the law. Section 256, Criminal Procedure Code, requires that, when a charge has been framed before the evidence of all the witnesses for the prosecution has been recorded, the evidence of any remaining witnesses shall be taken. Section 258, Criminal Procedure Code, requires that after a charge has been framed the accused shall be either acquitted or convicted. The District Magistrate complied with neither of these sections. He did not examine the remaining witnesses for the prosecution and he did not either acquit or convict the accused. It is certainly not the intention of section 227, Criminal Procedure Code, that a Magistrate should cancel a charge and write in its place an entirely different charge with the result of avoiding the provisions of other sections of the Code. Although, therefore, it may be difficult to hold with the learned Sessions Judge that the accused was discharged, there need be no difficulty in holding that the cancellation of the charge under section 392, Indian Penal Code, was irregular and that the proceedings are incomplete. In view of the technical doubt as to the effect of the Magistrate's action, it might have been better for the Sessions Judge to refer the case to this Court for orders. But I am of opinion that the view taken by the Sessions Judge was substantially correct and that the case is one which has not been properly enquired into or tried. As the learned Judge remarks, there are other allegations against the accused besides those of assault and robbery. The District Magistrate would have exercised a wise discretion in carefully recording the evidence of all the witnesses named for the prosecution and in thereafter considering what charges, if any, should be framed against each or all of the accused.

I have been asked to consider the point raised before the District Magistrate that the pigeons which the accused are said to have stolen could not, under the circumstances stated, be the subject of theft. I do not feel called upon to decide the point, which does not seem to arise at this stage of the proceedings.

The Sessions Judge's order directing further enquiry into the case of the second, third, and fourth accused is clearly within his power and is not open to objection. Similarly, it was within his competence, to order further enquiry into the allegations against the first accused, the present applicant, other than those comprised in the charges under sections 392 and 352, Indian Penal Code. As regards the charge under section 392, Indian Penal Code, as I have said, it is possible that the Sessions Judge's order may be open to objection on technical grounds. I therefore set aside that part of the order of the

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Sessions Judge. The only satisfactory way of dealing with the case is to have it enquired into from the beginning. I therefore set aside the whole of the proceedings of the District Magistrate and direct him to hold a fresh enquiry and to dispose of the case in accordance with law. In carrying out this direction he will be guided by the orders of the learned Sessions Judge.

Criminal Procedure—244, 252.

Criminal Procedure—244, 252.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. NGA NGWÈ NYUN.

Criminal Procedure, 244—Case instituted on complaint—Magistrate bound to examine complainant in presence of accused.

*Criminal Revision
No. 719 of
1898.
September
24th.*

The accused was convicted under section 504, Indian Penal Code, for having used abusive language.

Held,—that in a case instituted on complaint the Magistrate is bound to examine the complainant (if any) in the presence of the accused.

Remarks on section 504, Indian Penal Code.

Reference:—1, U. B. R., 1892—96, page 290.

IT seems necessary to point out that in a case instituted on complaint the Magistrate is bound to examine the complainant (if any) in the presence of the accused. This is prescribed in summons cases by section 244, Code of Criminal Procedure (unless the accused is convicted on his own admission under section 243), and in respect of warrant cases in section 252. The not uncommon practice of examining the complainant only under section 200, Criminal Procedure Code, and omitting to examine him at the trial, is contrary to law.

It seems necessary also to draw attention to the provisions of section 504, Indian Penal Code. The offence punishable under that section is intentionally insulting and thereby giving provocation to any person intending or knowing it to be likely that such provocation will cause him to break the public peace or to commit any other offence, not the mere use of abusive language towards a person, as set forth in the charge in this case. Abuse does not necessarily, though it often may, constitute an offence under this section. Reference may be made to the case of *Queen-Empress v. Mi Te** where the subject is discussed at length.

* 1, U. B. R., 1892-96, page 290.

Criminal Procedure—250.

Criminal Procedure—250.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS *v.* SAHAWATH ALI KHAN.

Criminal Revision
No 262 of
1898.
June
8th.

Criminal Procedure 560—F frivolous or vexatious accusations—Compensation.*

Sergeant Sahawath Ali Khan received information that one Maung Tòk was keeping a common gaming-house. He reported this to the Inspector Maung Tun who applied for a warrant under section 5 of Act III of 1867†. A warrant was issued addressed to the Inspector. It was endorsed by the Inspector to Sergeants Maung Ka and Sahawath Ali Khan and was duly executed. Sahawath Ali Khan then submitted a report of his proceedings, which was endorsed by his superior officers, the Inspector and the Assistant Superintendent of Police, and apparently sent to the Court with the persons who had been arrested under the warrant. In trying the case, the Magistrate, in recording the evidence of the sergeant, styled him the complainant and purported to examine him under section 200, Code of Criminal Procedure. He acquitted the accused in due course and ordered the Sergeant, whom he called the complainant, to pay them compensation on the ground that the accusation was frivolous.

Held.—On the authority of the case cited in I.L.R., 21, Cal., 984, that section 560*, Code of Criminal Procedure, does not apply to a case instituted on a police report or on information given by a police officer, and that the Magistrate's order was therefore illegal.

Order set aside accordingly.

Reference.—

I.L.R., 21, Cal., 984.

1, U. B. R., 1892—96, p. 28.

I HAVE considered the points submitted by the Subdivisional Magistrate, who has stated his views fully and clearly, though at inordinate length.

From the evidence of the Sergeant Sahawath Ali Khan it appears that he received information that one Maung Tòk was keeping a common gaming-house. He reported this to the Inspector Maung Tun, who applied for a warrant under section 5 of Act III of 1867.† A warrant was issued addressed to the Inspector. Presumably this warrant was issued by the District Superintendent of Police, though I cannot decipher the signature. It was endorsed by the Inspector to Sergeants Maung Ka and Sahawath Ali Khan, and was duly executed. Sahawath Ali Khan then submitted a report of his proceedings, which was endorsed by his superior officers, the Inspector and the Assistant Superintendent of Police, and apparently sent to the Court with the persons who had been arrested under the warrant. In trying the case, the Magistrate, in recording the evidence of the sergeant, styled him the complainant and purported to examine him under section 200, Code of Criminal Procedure. He acquitted the accused in due course and ordered the sergeant, whom he called the complainant, to pay them compensation on the ground that the accusation was frivolous.

The accused have shown cause against the reversal of the Magistrate's order awarding them compensation. The Magistrate has also

* [Section 250 of the Code of Criminal Procedure, 1898.]

† [Section 6 of the Gambling Act, 1899.]

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shown cause in support of his order. The reasons urged by the Magistrate are—

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- (i) that it was impossible to proceed against the person who gave information to the sergeant as the latter declined to disclose the source of his information;
- (ii) that the sergeant, though justified in searching the house, was not justified in "instituting the case;"
- (iii) that the sergeant, in submitting a report of his proceedings, was an informant for the purpose of section 191 (c) of the Code of Criminal Procedure, 1882;*
- (iv) that section 560, Code of Criminal Procedure, 1882† clearly renders somebody responsible in any case not taken up by the Magistrate of his own knowledge;
- (v) that a police officer who gives information is as much liable under this section as any other person.

On the case as revealed by the records and on the above arguments I have to observe in the first place that it is an abuse of language to describe the accusation as frivolous. The prosecution alleged that, on entry of a house under a warrant issued in virtue of section 5 of Act III of 1867‡ instruments of gaming and persons assembled either gaming or for the purpose of gaming were found. The defence was that the cards found in the house were placed there by one Tha Ban. If this defence was established, the accusation was deliberately false, not merely frivolous.

The sergeant could not be considered the complainant in the case. It is true that in *Queen-Empress v Ma Min Mè* § (reference to which might have afforded the Subdivisional Magistrate some additional arguments) it seems to have been held that a police report means a report under Chapter XIV of the Code of Criminal Procedure, 1882; and it was clearly ruled that, when a police officer applies for the issue of process in a non-cognizable case, he must be examined as a complainant under section 200, Code of Criminal Procedure. But in this case the sergeant was not applying for the issue of process in a non-cognizable case. He had executed a warrant, and I do not see what he could do but report his proceedings, and, under the orders of his superior officer, bring before the Magistrate the persons who had been arrested. He was also bound to state as a witness what had occurred on the occasion of the execution of the warrant. If he made a false report or gave false evidence, he rendered himself liable to penalties. But he was not a complainant and he did not become a complainant because the Magistrate caused him to sign his deposition

* [Section 190 (c) of the Code of Criminal Procedure, 1898.]

† [Section 250 of the Code of Criminal Procedure, 1898.]

‡ [Section 6 of the Gambling Act, 1899.]

§ 1, U.B.R., 1892—96, page 28.

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Section 560, Code of Criminal Procedure, 1882,* so far from being framed for the purpose of making some one responsible under it in all cases, clearly relates to cases in which information is given or complaints preferred by persons other than police officers. If it had been the intention of the Legislature to make police officers responsible under this section, it is difficult to see why the case of prosecutions instituted on police reports should be excluded.

The High Court of Calcutta in *Ramjeevan Kovemi v. Durga Charan Sadhu* † has ruled that this section "will not apply to a case" instituted on a police report or on information given by a police "officer." There can be no doubt that this is the reasonable interpretation of the section, and I have no hesitation in adopting it. An additional argument in favour of this view is afforded by the fact that, notwithstanding the above ruling, the Legislature, when recently revising the Code of Criminal Procedure, has not altered the wording of section 560, Code of Criminal Procedure, 1882 (=section 250, Code of Criminal Procedure, 1898). If the intention of the law were doubtful, or if it had been incorrectly apprehended, it is reasonable to suppose that doubt would have been set at rest or erroneous construction rendered impossible by revision of the section.

For these reasons, I set aside the order of the Subdivisional Magistrate in case No. 10 of 1898 ordering compensation to be paid to the accused under section 560, Code of Criminal Procedure, 1882, and I direct that the amount paid by him as compensation be refunded to Sahawath Ali Khan.

* [Section 250 of the Code of Criminal Procedure, 1898.]

† I.L.R., 21, Cal., 984.

Criminal Procedure—250 (2)—388 (2).

Criminal Procedure—250 (2)—388 (2).

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS *v.* NGA MYIT.

Criminal Procedure 250 (2)—Imprisonment in default of payment of compensation, Section 388 (2), Code of Criminal Procedure.

Imprisonment in default of payment of compensation ordered under section 250 cannot be awarded at once unless the person ordered to pay fails to execute a bond under section 388, Criminal Procedure Code.

THE Magistrate's order directing the complainant to pay compensation and in default to undergo simple imprisonment for 20 days appears to be irregular. The proper procedure is that prescribed by section 388, sub-section (2), Code of Criminal Procedure. If compensation awarded under section 250, Criminal Procedure Code, is not paid forthwith, the Magistrate should proceed to issue a warrant for the realization of the fine and should give the complainant the option of executing a bond, with or without sureties, for his appearance on the day appointed for the return of the warrant. If the complainant does not execute the bond as directed, the Magistrate may then proceed at once to pass sentence of imprisonment. But for the provisions of section 388 (2), Criminal Procedure Code, imprisonment in default of payment of compensation under section 250 of the Code could be awarded only when the compensation could not be recovered.

It need hardly be added that it is not necessary to sell the complainant's property if he pays the compensation even after the issue of a warrant under section 386, Criminal Procedure Code.

Criminal Revision

No. 190 of

1899.

March

29th.

Criminal Procedure—255.

Criminal Procedure—255.

Before G. D. Burgess, Esq., C.S.I.

MI NYEIN v. QUEEN-EMPRESS.

Criminal Revision

No. 433 of

1897.

May

6th.

Code of Criminal Procedure 255—Plea of guilty—Conviction on—Penal Code 412—Dishonestly receiving stolen property knowing or having reason to believe that the possession thereof had been transferred by the commission of dacoity—Proof required.

The accused was convicted under section 412, Penal Code, and sentenced by the Court of First Instance to one year's rigorous imprisonment for having purchased a carpet knowing it to be dacoited property.

She appealed to the Court of Session and the Lower Appellate Court summarily rejected her appeal without going into the merits, as it ought properly to have done, on the grounds that she had pleaded guilty in the Court of First Instance and that the sentence was not too severe.

The accused, in her petition of appeal, had pleaded that she had committed a solitary fault by honestly purchasing the property in question without knowledge that it was stolen, and it was obvious besides from the proceedings that the plea of guilty should not have been recorded.

It was plainly made in pure ignorance of the law, the woman imagining that she had offended by merely having the property in her hands.

Held—that where people are so ignorant as Burmans are of the most elementary legal principles, it is extremely dangerous to accept an admission as a plea of guilty without the closest scrutiny of the meaning of the acknowledgment.

Held—also that here was no evidence whatever to show that accused, when she bought the property knew or had reason to believe that it was stolen. Much less was there evidence that she knew that the property had been taken in dacoity or even that any dacoity had occurred, and, not only so, but strictly speaking the record did not even contain distinct proof of the commission of the dacoity alluded to by the witnesses.

Conviction and sentence quashed.

Reference:—

i. U. B. R., 1897—1901, page 78.

It is a pity that the Lower Appellate Court should have rejected the applicant's appeal summarily instead of going into the merits of the case.

The applicant, in her appeal, did not only ask for a reduction of sentence; she pleaded that she had committed a single fault by honestly purchasing the property in question without knowledge that it was stolen, and it is obvious from the proceedings of the District Magistrate that the plea of guilty should not have been recorded. It was plainly made in pure ignorance of the law, the woman imagining that she had offended by merely having the property in her hands.

Where people are so ignorant as Burmans are of the most elementary legal principles, it is extremely dangerous to accept an admission as a plea of guilty without the closest scrutiny of the meaning of the acknowledgment.

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The District Magistrate has convicted on the ground of the property having been obtained from accused's son-in-law, who was one of the persons who stole it, and has referred to evidence in another case which was no evidence against accused.

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The first circumstance was clearly insufficient to make out an offence, and there was no evidence whatever in the case to show that accused, when she bought the property, knew or had reason to believe that it was stolen. Much less was there evidence that she knew the property had been taken in dacoity, or even that any dacoity had occurred, and not only so, but strictly speaking the record does not contain distinct proof of the commission of the dacoity which is referred to by the witnesses.

Even if accused had been shown to have ground for suspicion that the property was stolen, the punishment for receiving a paltry article like this, a carpet worth four or eight annas, was extravagant.

If accused had committed any offence, she would have been more than amply punished for it by the four months' imprisonment she has now undergone.

But there is no proof of her commission of any offence, and the conviction and sentence must therefore be quashed.

Criminal Procedure—256.

Criminal Procedure—256.

Criminal Revision
No. 856 of
1898.
October.
14th.

Before H. Thirkell White Esq., C.I.E.

NGA O v. QUEEN-EMPRESS.

*Criminal Procedure 256—Accused may cross-examine each witness if he wishes
 , to do so at the conclusion of the examination-in-chief.*

The Magistrate held that the cross-examination of the witnesses for the prosecution should be deferred till after the charge, if any, had been framed.

Held—That though an accused person cannot be required to cross-examine the witnesses or to say whether he will cross-examine them or not until the charge has been framed, he may, if he wishes to do so, cross-examine each witness at the conclusion of the examination-in-chief.

* * * *

BEFORE dealing with the above points I may conveniently refer to a matter of procedure which arose in the course of the trial. The District Magistrate held that the cross-examination of the witnesses for the prosecution should, under the Code of Criminal Procedure, 1898, be deferred till after the charge, if any, had been framed. I do not think that this is the intention of the Code. An accused person cannot be required to cross-examine the witnesses, or to say whether he will cross-examine or not, until the charge has been framed, *i.e.*, he may if he wishes to do so, defer cross-examination till after the charge has been framed, and he has in any case under section 256, Code of Criminal Procedure the right to cross-examine the witnesses after he has been charged, whether he has already cross-examined them or not. But there is nothing in the Code to prevent the cross-examination of each witness immediately after the examination-in-chief, and an accused person should be allowed to cross-examine each witness as the case proceeds, if he wishes to do so.

* * * *

Criminal Procedure—260.

Criminal Procedure—260.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. BUSTIEN.

Criminal Procedure, 260—Summary trial—Wrong trial, summarily, of an offence which cannot be so tried.

An accused person cannot be convicted in a summary trial of an offence which cannot be tried summarily.

Criminal Revision
No. 145 of
1898.
May
4th.

The accused was sent up for trial by the police on a charge of theft as a servant of property valued at less than Rs 50. He was tried summarily and convicted of theft as a servant under section 381, Indian Penal Code, and of criminal breach of trust under section 408, Indian Penal Code.

Held—That the conviction under section 408 was void for want of jurisdiction.

THE accused was sent up for trial by the police on a charge of theft as a servant of property valued at less than Rs. 50. He was tried summarily and convicted of theft as a servant under section 381, Indian Penal Code, and of criminal breach of trust under section 408, Indian Penal Code. I am not sure that the evidence warranted a conviction under the latter section. But there can be no doubt that, when a Magistrate finds that the facts alleged, if established, disclose an offence not triable summarily, he should proceed to try the case according to the ordinary procedure.* On examination of the prosecutor who was the first witness, the Magistrate was aware of the allegations against the accused and was in a position to decide what offences they disclosed. There is no authority for the conviction of an accused person in a summary trial of an offence which cannot be tried summarily. The Magistrate would not, it is hardly necessary to say, be justified in ignoring the facts which ousted his summary jurisdiction and proceeding with the trial only in respect of offences which could be tried summarily.

As the sentences in this case have both been carried into effect, it is not necessary to pass a formal order quashing the proceedings.

* See also section 260, sub-section (2), of the Code of Criminal Procedure, 1839.

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Criminal Procedure—271.

Criminal Appeal
No. 2 of
1897
January
13th

Before G. D. Burgess, Esq., C.S.I.
 NGA SHWE KYI v. QUEEN-EMPRESS.

Code of Criminal Procedure, s. 271—Plea of guilty—Conviction of murder—
Culpable homicide not amounting to murder.

The appellant, who was charged with murder under section 302, Penal Code, acknowledged having killed his wife, but excused his act on the plea of provocation. The Court of Session recorded a plea of guilty and convicted accused thereon.

Conviction and sentence set aside and a retrial ordered as the plea obviously was not intended to be and did not amount to a plea of guilty under the section charged, and the accused was entitled to be tried and to have an opportunity of establishing the alleged facts, if he could, in order to show such grave and sudden provocation as would reduce the offence committed to culpable homicide not amounting to murder.

THIS appeal must be allowed. The appellant has been convicted on his own plea of guilty, and no doubt he acknowledged that he had killed his wife, but at the same time he made a long statement describing how his wife had irritated him with insulting and taunting language and had finally exasperated him beyond endurance by thrusting a blazing piece of firewood at him and burning him. He has adopted the same line of defence all through from the time of the occurrence, and it is clear that he meant to excuse his act and reduce its gravity by the plea of that serious sort of provocation which is technically called grave and sudden.

He never meant therefore to plead guilty to the offence of murder pure and simple and the plea should not have been accepted as one of guilty to the charge under section 302, Indian Penal Code. As the story of appellant-accused rests mainly on his own word, there will doubtless be some difficulty about proving it; but there are certain circumstances which give it an air of probability, and, if the witnesses are examined on the point, there is every reason to believe that there is a possibility of certain facts being brought out in corroboration of the truth of the account. For instance, it may be possible to prove that the altercation took place, that there was a fire beside the spot, that a burning brand or piece of wood was found near deceased, and that there were marks of fire on appellant's body or clothes. The Court of Session did not think that the small hole in his sleeve shown by accused indicated a burn, but the same hole immediately after the transaction may have told a different tale with its fresh marks, if the story can be relied on.

The judgment of the Court of Session was affected apparently by the absence of evidence of the burn. Whether the burn, if proved, and the language of deceased would together or separately amount to grave and sudden provocation, is a question for decision hereafter and not just now. The appellant-accused is entitled in the first

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place to establish the facts if he can, and in the second place to show if he is able that the facts proved constitute within the meaning of the law the grave and sudden provocation which would reduce the offence committed to culpable homicide not amounting to murder. Till he has had such opportunity he cannot properly be convicted under section 302, Indian Penal Code.

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The conviction and sentence on the appellant Nga Shwe Kyi are accordingly set aside and a retrial will have to be had.

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Criminal Appeal
No. 48 of
1897.
April
27th.

Before G. D. Burgess, Esq., C.S.I.

NGA SAN DAIK *v.* QUEEN-EMPRESS.

Code of Criminal Procedure 271—Plea of guilty—Conviction of murder.

The appellant-accused, who was charged with murder and attempt to murder under sections 302 and 307, Penal Code, was convicted of the former offence on his own plea of guilty. In appeal he urged deep provocation in extenuation of his offence.

In this country, where there is as a general rule profound popular ignorance of law, it is necessary to accept a plea of guilty, particularly in a capital case, with extreme caution. A Burman has usually no clear perception of the distinction between killing which is murder and killing which is manslaughter only or, as it is called in the Penal Code, culpable homicide not amounting to murder. But the committal proceedings did not in any way support the position accused wished to take up in appeal, and the record of the trial contained no indication that the plea of guilty was qualified by, or was intended to be qualified by, any limitation or reservation.

The plea of guilty must therefore be accepted for what it professed to be, namely, an acknowledgment of the legal liability specified in the charge to which the plea was made.

Appeal dismissed accordingly.

Reference :—

1, U. B. R., 1897—1901, page 76.

Extract from reasons for committal.

The accused in this case was the husband of the murdered woman, Ma San Hmôn, from whom he divorced about a month ago, and the son-in-law of Ma Shwe Myaing, whom he attempted to murder immediately after murdering his divorced wife. The motive for so doing is to be found in the confession of the accused, which states that accused wished to be re-united to his wife and the mother-in-law prevented it by finding another husband for her daughter.

On the 28th November 1896, at about 9 A.M., accused took the loan of a "*da-she*" (Exhibit 1 in the case) from Maung Kyauk Lôn (11th witness for prosecution) for purpose of cutting up fish. The same day at about 3 P.M., armed with this *da*, which he concealed under a towel wrapped round his body, he proceeded to the house where his mother-in-law and his divorced wife lived. On arrival at the foot of the stairs at the back of the house he was seen by Ma Thali (1st witness for prosecution), who was cleaning some vegetables on the back staging of her house adjoining the house where accused stood. Accused was at the time living in the house of witness Ma Thali, a relation of his divorced wife. On seeing her accused said မသားကြည့်လိုက်မို့. (Ma Thali, see what I am going to do!), and ascending the back stairs entered the house of deceased, Ma San Hmôn, who, according to the evidence of Ma Shwe Myaing, her mother (13th witness), was cooking at the time. What transpired inside the house is not known, but immediately after the entry of accused witness Ma Thali heard her cousin, deceased Ma San Hmôn, cry out three times as if in pain and she also heard the stamping of feet on the plank flooring of the house as of some persons running. Being alarmed, witness Ma Thali rushed off to the front of her house and cried aloud for help. This witness saw accused rush out from the front of the deceased's house exclaiming ဒေဝယ်ကြီးကော (Where is the old woman?), and armed with a "*da-she*" similar to Exhibit 1. Witness Ma Thali begged accused not to harm Ma Shwe Myaing, the old lady alluded to by accused. Accused rushed towards her with uplifted *da* and witness ran. Maung Tun Win (2nd witness for prosecution) next cried out

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to accused not to strike the old lady Ma Shwe Myaing, and accused ran up to him with uplifted *da* and witness ran away. Accused then ran up to Ma Shwe Myaing, his mother-in-law (13th witness for prosecution), who was returning with a basket (Exhibit 2) in hand after having thrown some rubbish some distance from the house. Witness Ma Shwe Myaing begged accused not to harm her and tried to ward off the blow aimed by accused with the *da*. The blow fell partly on the small basket and partly on the wrist, severing the right hand at the wrist-joint. Accused then snatched the basket from the hand of witness Ma Shwe Myaing and threw it away and gave witness three more cuts with the *da*, and believing that he had killed her, he threw away the *da* in the plantain garden near by and proceeded straight to the police station-house to deliver himself up. On the way Maung Thet Pyin (7th witness for prosecution) asked him to state what was the matter, and he answered that he had killed Ma San Hmôn and Ma Shwe Myaing and was ready to be hanged. On arrival at the police station-house accused informed Maung San Chein, policeman (8th witness for prosecution), that he had just killed his wife and mother-in-law Ma San Hmôn and Ma Shwe Myaing, and had come to deliver himself up. While the policeman was opening the cage door the Police Head Constable came up and accused was arrested.

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* * * *

The accused confessed before the Headquarters Magistrates, and this confession he confirmed before this Court. The evidence against accused as regards the murder of Ma San Hmôn is chiefly his own confession corroborated by the evidence of Ma Thali (1st witness for prosecution), who saw him enter the house and immediately after heard the deceased cry out in pain and saw accused come out of the house armed with a *da* (Exhibit 1). The confession is also corroborated by Maung Thet Pyin (7th witness for prosecution) and Maung San Chein (8th witness for prosecution), who were told by accused that he (accused) had killed Ma San Hmôn. The possession of the *da* (Exhibit 1) by accused is accounted for by the evidence of Maung Kyauk Lôn (11th witness for prosecution).

* * * *

The defence has not named any witness. The reason given by the accused in his confession for the commission of the offence is that he wished to be reunited to his wife and his mother-in-law prevented this by finding another husband for her daughter.

* * * *

Judgment in Appeal.

The appellant-accused has been convicted on his own plea of guilty.

There is no question that he killed the deceased, who had been his wife, but what he has now to urge in his appeal is that he received deep provocation through the injurious treatment of his mother-in-law who deprived him of his wife and bestowed her on another man, and that the killing was no premeditated and deliberate murder, but was the result of an excess of passion carrying him into an excess of violence.

In this country, where there is as a general rule profound popular ignorance of law, it is necessary to accept a plea of guilty, particularly in a capital case, with extreme caution. A Burman has usually no clear perception of the distinction between killing which is murder and killing which is manslaughter only or as it is called in the Penal

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Code culpable homicide not amounting to murder, and in a recent case,* which will appear among the Printed Judgments of the first quarter of the year, I had occasion to point this out in an individual instance.

But the committal proceedings in the present case do not in any way support the position which the appellant seems to wish to take up now, and the record of the trial contains no indication that his plea of guilty was qualified by or was intended to be qualified by any limitation or reservation, and I am satisfied that the plea was what it professes to be, namely, an acknowledgment of the legal liability specified in the charge to which the plea was made.

If a full trial were now ordered, I cannot see the prospect of a single point being established in favour of appellant, who had no witnesses to produce, or of a single advantage being gained in the cause of justice.

This appeal must therefore be dismissed.

* Page 76.

Criminal Procedure—337.

Criminal Procedure—337.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS *v.* NGA TUN BAW AND TWO OTHERS.

Criminal Procedure 337—Pardon tendered under reasons to be recorded.

In this case a pardon was tendered to an accomplice under section 337, Criminal Procedure Code.

When a Magistrate tenders a pardon under section 337, Criminal Procedure Code, he is bound to record his reasons for so doing.

* * * *

I NOTE that when a Magistrate tenders a pardon under section 337, Code of Criminal Procedure, he is bound to record his reasons for so doing. The rule in this respect is the same in Upper Burma as elsewhere.

Criminal Appeal
No. 99 of
1898.
October
17th.

Criminal Procedure—342.

Criminal Procedure—342.

Criminal Revision
No. 597 of
1899.
July
5th.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. NGA PYAUNG AND ANOTHER.

Criminal Procedure, s. 342—Accused, examination of—to explain any circumstances appearing in evidence against him.

Held—that it is the duty of the Magistrate both in summons and warrant cases, after the witnesses for the prosecution have been examined, to examine the accused for the purpose of enabling him to explain any circumstances appearing in evidence against him.

* * * *

It is to be regretted that the Magistrate omitted to examine the accused. The provisions of section 342, Criminal Procedure Code, are imperative and apply to summons cases as well as to warrant cases. It is true that section 245, Criminal Procedure Code, appears to leave it to the discretion of the Magistrate whether he will examine the accused in a summons case or not. But, in view of the plain terms of section 342, Criminal Procedure Code, I think this must be construed as applying to cases in which the Magistrate, after hearing the evidence for the prosecution, sees nothing which the accused should be required to explain. Section 253, Criminal Procedure Code, in the chapter on the trial of warrant cases, also refers to the examination of the accused "if any." If these two sections were construed so as to leave the examination of the accused to the discretion of the Magistrate, the imperative injunction in section 342, Criminal Procedure Code, would be of no effect. It is therefore the duty of the Magistrate, both in summons and warrant cases, after the witnesses for the prosecution have been examined, to examine the accused for the purpose of enabling him to explain any circumstances appearing in evidence against him. Where in a summons case the accused is convicted on his own admission under section 243, Criminal Procedure Code, or where the evidence for the prosecution discloses no case against him, the examination of the accused is not necessary.

* * * *

Criminal Procedure—345.

Criminal Procedure—345.

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS *v.* NGA TUN MYA.

Criminal Revision
No. 388 of
1897.
May
14th.

Criminal Procedure Code, 345. Compounding offence with permission of Court—Court bound to exercise sound and reasonable discretion in grant of such permission.

Charges under section 324, Penal Code, of voluntarily causing hurt with dangerous weapon. About two years ago the accused, in the course of a quarrel, struck the complainant, his nephew, on the head with a billet of wood and knocked him down. Accused then absconded to Lower Burma, where he has since avoided process of law till the present time.

Proceedings against him were taken under section 512, Code of Criminal Procedure. The Magistrate, on complainant's application, gave permission to compound the offence.

*Held—*that, under such circumstances, the Magistrate's order granting permission to compound the case was on the face of it a wrong and improper exercise of judicial discretion.

Order quashed and trial directed.

It appears that the accused, having been charged with an offence under section 324, Indian Penal Code, absconded from justice and evaded process of law for two years.

Under such circumstances the Magistrate's order granting permission to compound the case seems on the face of it an improper exercise of judicial discretion.

Let the accused be called upon to show cause why the order of permission to compound should not be quashed and a trial directed. He is at liberty to show cause, if he prefers, before the District Magistrate instead of here.

* * * *

District Magistrate's Report.

Maung Tun Mya files a written statement. He is asked if he has any cause to show why the permission to compound should not be quashed and a re-trial directed.

He states: "I ran away because I was afraid of the law in connection with the 'hurt case. I had no grudge against the complainant, but struck him in a sudden 'quarrel.'"

* * * *

Read District Magistrate's proceedings and accused's petition

The accused shows no cause whatever against the proposed order, which is made accordingly.

I disapprove emphatically of the action of the Subordinate Magistrate in giving permission to compound this case. It was virtually holding out a premium to the evasion of justice to allow such a thing.

Criminal Procedure—346, 347.

Criminal Procedure—346, 347.

Criminal Revision
No. 608 of
1897.
May
11th.

Before G. D. Burgess, Esq., c.S.I.

QUEEN-EMPRESS v. NGA LU.

Criminal Procedure Code, 346, 347. Duty of Subordinate Magistrates to refer immediately to a Superior Court cases in which there is reason to believe that an offence beyond their own jurisdiction has been committed, and to be careful to avoid taking cognizance of a major offence as a minor.

Offences falling under sections 376 and 511, Penal Code, improperly tried under section 354. District Magistrates desired to issue instructions to Subordinate Magistrates in order to the prevention of such irregularities.

References—

1, U. B. R., 1892-96, page 231.

1, U. B. R., 1897-1901, page 327.

There was clearly ground for trying accused for an attempt to commit rape, and the Subordinate Magistrate did wrong trying the case himself. This has been pointed out in circulars* which the Magistrate ought to have read and obeyed.

Properly, there ought to be a retrial which the District Magistrate should have ordered in appeal, but as no serious harm has been done, things may now be allowed to stand as they are.

The unwarrantable assumption of jurisdiction by Subordinate Magistrates, by trying for a minor offence where a major offence has been committed, is becoming a constant source of difficulty and a stumbling block to proper judicial administration.

The High Court is naturally reluctant to open up proceedings afresh, and to put the parties, witnesses, and public authorities to more trouble and inconvenience, while on the other hand to pass matters over is to permit offenders to escape the full measure of punishment that they deserve and that is expedient for the protection of society.

I must therefore suggest to the District Magistrate the issue of stringent instructions to his subordinates in order to the prevention of the repetition of such grave irregularities.

* 1, U. B. R., 1892-96, page 231 and page 327.

Criminal Procedure—346, 347, 348.

Criminal Procedure—346, 347, 348.

Before G. W. Shaw, Esq.

KING-EMPEROR *v.* NGA AT AND NGA SHWE BYA.

Criminal Revision
No. 937 of
1901.
October
15th.

Proceedings stayed by 1st class Magistrate during trial and submitted to the District Magistrate on finding that one of the accused had been previously convicted—District Magistrate should try case de novo.

The Subdivisional Magistrate (1st class) during the trial of two accused, found that one of them had been previously convicted.

He accordingly stayed proceedings and submitted the case to the District Magistrate under section 348, Criminal Procedure Code.

Held—that by section 346, Criminal Procedure Code, the Subdivisional Magistrate was at liberty to stay proceedings at any time during the enquiry or trial and submit the case to the District Magistrate.

Held also—that what the District Magistrate had to do was to try the case himself *de novo* under section 346 (2), Criminal Procedure Code.

THIS case was submitted by the District Magistrate with the following remarks :—

“The Subdivisional Magistrate has sent Nga At up to my court for higher punishment. He does not say under what provision of law this is done. Section 349 of the Criminal Procedure Code permits a Magistrate of the 2nd or 3rd class to send an accused up to the District Magistrate or Subdivisional Magistrate for higher punishment, but it does not empower a Magistrate of the 1st class doing this, as the District Magistrate or Subdivisional Magistrate can only give the same punishment as the 1st class Magistrate.

“There is another accused in the case who has been sentenced to two years’ rigorous imprisonment. As I am not authorized to hear appeals or take up revisions from 1st class Magistrates, I beg to submit the case to the Court of the Judicial Commissioner, Upper Burma, with the request that the proceedings be quashed and a re-trial ordered before me or any other order the Judicial Commissioner thinks fit.

THE Subdivisional Magistrate explicitly recorded that the transferred the case to the District Magistrate under section 348, Criminal Procedure Code.

By section 346 he was at liberty to stay proceedings at any time during the enquiry or trial and submit the case to the District Magistrate.

Sections 347 and 348 must be read in continuation of section 346.

The Subdivisional Magistrate’s procedure was quite correct. He might possibly have discovered somewhat earlier that the accused Nga At had been previously convicted of theft and sentenced to two years’ rigorous imprisonment. This would perhaps have saved delay and trouble to the witnesses.

What the District Magistrate had to do was to try the case himself *de novo* [under section 346 (2)].

I do not find that Shwe Bya has been sentenced to two years’ imprisonment as the District Magistrate says.

Criminal Procedure—346, 347, 348.

KING-EMPEROR**NGA AT.**

The Subdivisional Magistrate so far as the record shows stayed proceedings against both accused and submitted the case to the District Magistrate really under section 346 read with section 348. In doing so he acted very properly.

It is desirable that both the accused should be tried by the same Magistrate.

The proceedings are returned to the District Magistrate for disposal in the manner above indicated.

Criminal Procedure—350, 528.

Criminal Procedure—350, 528.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. NGA PO MIN AND THREE OTHERS.

Criminal Procedure 350, 528—When a case is withdrawn or transferred under s. 528 the proceedings should be commenced afresh.

Accused should be informed of their option under section 350.

The case was instituted in a Township Court, but withdrawn by the Subdivisional Magistrate under section 528, Code of Criminal Procedure, and transferred to his own file at the request of the accused.

The Subdivisional Magistrate did not re-examine the witnesses, but completed the trial and gave judgment on the depositions recorded by the Township Magistrate.

Held—that section 350, Criminal Procedure Code, does not apply to cases withdrawn under section 528, Criminal Procedure Code, and that the trial should have been begun afresh.

References :—I.L.R., 20, Cal. 870; 24 W.R., Criminal 53; Sir H. Princep's Code of Criminal Procedure, 1898, page 293.

THE case was instituted in the Court of the Township Magistrate. It was withdrawn by the Subdivisional Magistrate under section 528, Criminal Procedure Code, and transferred to his own file at the request of the accused. The Subdivisional Magistrate did not re-examine the witnesses, but completed the trial and gave judgment on the depositions recorded by the Township Magistrate. He considers that this procedure is justified by section 350, Criminal Procedure Code.

There is authority for the opinion that this section does not apply to cases of transfer or withdrawal under section 528, Criminal Procedure Code, or the corresponding sections of earlier Codes. In the case of *Khan Mahomed* * the High Court at Calcutta said :—" We have " no doubt that, when a case under trial is removed under section 47, " the whole proceedings must commence *de novo* in the manner provided for in a similar case by section 45." This case was decided under the Code of 1872, under which the law in this matter was substantially the same as under the Code of 1882, and the present Code, section 47 of the Code of 1872, being equivalent to section 528, and section 45 to section 346 of the latter Codes. The same opinion was expressed by the same High Court, in a later case, in which the learned Judges said :—" This section [350] is obviously intended to meet the case of transfer of Magistrates from one district to another and to prevent the necessity of trying from the beginning all cases which may be part heard at the time of such transfer." (*Hardwar Singh or Lall v. Khega Ojha*.)† A similar view is said to have been taken by the

Criminal Revision
No. 380.
1898.
August
23rd.

* 24 W.R., Criminal, 53. † I.L.R., 20 Cal. 870.

Criminal Procedure—350, 528.

QUEEN-EMPRESS High Court at Allahabad.* The rulings of the Calcutta High Court, which have been cited above, appear to express the intention of law.
v.
NGA PO MIN. When a case is withdrawn under section 528, Criminal Procedure Code, the trial or enquiry should be begun afresh. Section 350, Criminal Procedure Code, is not applicable to cases of this kind.

As a matter of practice, in cases to which section 350, Criminal Procedure Code, does apply, the accused should be informed of their right to have the witnesses or any of them re-summoned and re-heard. This is not explicitly enacted in the Code of Criminal Procedure, and doubtless accused persons are expected to know their rights. But as a matter of fact they are usually ignorant of them, and it is obviously fair that they should be informed. The fact that they have been so informed should appear on the record.

* Sir H. Princep's Code of Criminal Procedure, 1898, page 293.

Criminal Procedure—396, 398, 426.

Criminal Procedure—396, 398, 426.

Before G. W. Shaw, Esq.

KING-EMPEROR *v.* NGWE GAING.

Criminal Revision
No. 711 of
1901.
September,
6th.

Substantive term of imprisonment—Date from which it should run when accused has been released owing to omission of substantive term through an error in warrant of commitment.

The accused was convicted under section 447, Indian Penal Code, and sentenced to three months' rigorous imprisonment and a fine of Rs. 30, or in default 20 days' rigorous imprisonment.

Through a mistake in the warrant of commitment to jail the substantive term of imprisonment was overlooked. The result being that the accused underwent only the period of imprisonment ordered in default of fine and was released. This was on 12th July. The error was then discovered and on the 17th July the accused was re-arrested and sent back to jail to undergo the substantive term of imprisonment and the Magistrate directed it to begin on the 17th July.

The District Magistrate referred the case thinking that paragraph 353 of the Upper Burma Courts Manual had been contravened.

Held—that there was no illegality in the Magistrate's order. There was no express provision for a case of the kind, but there was no authority for the view taken by the District Magistrate which would involve excusing the accused's imprisonment for the five days (12th to 17th July), during which he was at liberty owing to the mistake that was made.

Reference :—

Upper Burma Courts Manual, paragraph 353.

THE accused was convicted under section 447, Indian Penal Code, and sentenced to three months' rigorous imprisonment and a fine of Rs. 30 or in default 20 days' rigorous imprisonment. Owing to a mistake the substantive sentence of imprisonment was overlooked in the preparation of the warrant of commitment to jail, the convict underwent the period of imprisonment ordered in default of the fine and was released. This was on the 12th July last. The error was then discovered and on the 17th July the man was re-arrested and sent back to jail to undergo the substantive sentence of imprisonment and the Magistrate directed it to begin on the 17th July.

The District Magistrate has referred the case, thinking that paragraph 353, Upper Burma Courts Manual, has been contravened.

I am of opinion that there was no illegality in the Magistrate's order.

No express provision is made for a case of the kind, but I am unable to find any authority for the view which the District Magistrate takes. It would involve excusing the convict imprisonment for the five days (from 12th to 17th July) during which he was at liberty owing to the mistake that was made. In the case of an escaped convict, the unexpired portion of the sentence begins to run from the date of his recapture; and section 398 (1), Criminal Procedure Code, says, referring to escaped convicts among others, "nothing in section 396.....shall be held to excuse any person from any part of the

Criminal Procedure—396, 398, 426.

KING-EMPEROR
v.
NGWE GAING.

punishment of which he is liable upon his former or subsequent conviction."

Again, when under section 426 (3) an Appellate Court has suspended the execution of a sentence of imprisonment pending the decision of the appeal, the time during which the prisoner has been at liberty is to be excluded in the event of his being ultimately sentenced to imprisonment.

What happened here was that in consequence of the mistake in the warrant the substantive term of imprisonment did not begin till five days after the imprisonment in default of payment of fine had expired.

I do not see what course could have been taken, but to make it begin then, without, in effect, remitting part of the sentence.

The proceedings are returned.

I trust the Subdivisional Magistrate will take care that so serious a mistake is not allowed to occur again in the issue of a warrant to the jail.

Criminal Procedure—403 (4), 530 (p), 537.

Criminal Procedure—403 (4), 530 (p), 537.

Before G. W. Shaw, Esq.

NGA PO HAN } { NGA THA LE NI.
NGA TO } { MI TU.

Mr. H. M. Lütter—for applicants. | Mr. C. G. S. Pillay—for respondents.

*Criminal Revision
No. 405 of
1901.
July 2nd.*

Order of acquittal—High Court's powers of revision—Order by High Court for retrial after acquittal.

This was an application by private parties asking the High Court to revise an order of acquittal. The accused brought a civil suit against the applicants and others on a bond. The bond appeared to have been altered after its execution. The Additional Township Judge ordered the accused's suit as against the applicants to be dismissed and four days later, on the petition of the applicants sanctioned the accused's prosecution "for forgery (section 463, Indian Penal Code)" under section 195 (c), Criminal Procedure Code. The accused were tried by the Subdivisional Magistrate, who after examining the witnesses for the prosecution, framed a charge under section 471, Indian Penal Code, but finally acquitted the accused. The bond being a valuable security as defined in section 30, Indian Penal Code, the alleged forgery fell under section 467, Indian Penal Code, and whether accused were tried under that section or section 471, the Subdivisional Magistrate was *ab initio* without jurisdiction to try the case. The question for decision was whether this Court should interfere in revision and order a retrial or commitment to the Court of Session.

Held—that as a general rule the High Court will not interfere with an order of acquittal, but it has the power to do so and there can be no doubt that this power may be properly exercised in particular cases.

Held also—that where a trial has been held without jurisdiction, as in the present case, it appears to be very proper that an order in revision should direct a new trial.

Held also—that section XV, Upper Burma Criminal Justice Regulation, and section 537, Criminal Procedure Code, do not cover a radical defect such as want of jurisdiction to try an offender. Their intention is to prevent unimportant irregularities from being set up as ground for interfering with orders, &c., passed by a court of competent jurisdiction. Section 530 (p) holds good and section 403 (4), Criminal Procedure Code, applies to this case.

References:—

- I. L. R., 9 All., page 134.
- 8 Bom., page 307.
- 8 Cal., page 895.
- 14 Mad., page 363.

THIS is an application by private parties asking this Court to revise an order of acquittal.

The accused brought a civil suit against the applicants and others on a bond. The bond appeared to have been altered after its execution in such a way as to make the applicants parties and executants. The Additional Township Judge ordered the accused's suit as against the applicants to be dismissed, and four days later, on the petition of the applicants, sanctioned the accused's prosecution "for forgery (section 463, Indian Penal Code)" under section 195 (c), Criminal Procedure Code.

Criminal Procedure—403 (4), 530 (p), 537.

NGA PO HAN
v.
NGA THA LE NI.

The accused were then tried before the Subdivisional Magistrate, who, after hearing the witnesses for the prosecution, framed a charge under section 471, Indian Penal Code, but finally acquitted the accused. The bond being a valuable security as defined in section 30, Indian Penal Code, the alleged forgery fell under section 467, Indian Penal Code, and whether accused were tried under that section or under section 471 the Subdivisional Magistrate was *ab initio* without jurisdiction to try the case. Probably the District Magistrate overlooked this, otherwise in transferring the case to the Subdivisional Magistrate he must have intended him to commit to the Court of Session.

The question for decision now is whether this Court should interfere in revision and order a retrial or commitment to the Court of Session. The rulings cited on one side or the other are as follows:—

*In re the Municipal Committee of Dacca v. Hingoo Raj.**

Queen-Empress v. Husein Gaibu.†

Queen-Empress v. Balwant.‡

Thandavan v. Perianna.§

In the Calcutta case the accused had been tried by a Bench of Honorary Magistrates for making an excavation without the permission of the Municipal Committee and acquitted, and the learned Judges of the High Court refused to interfere in revision saying "it is a rule of this Court that as a Court of Revision it cannot interfere with an order of acquittal."

In *Queen-Empress v. Husein Gaibu* † the facts were similar to those of the present case. The accused was tried by a Magistrate under section 417, when the facts disclosed an offence under section 420, Indian Penal Code, which the Magistrate was not competent to try. The decision of the Bombay High Court was that the offence having been tried without jurisdiction the proceedings were void under section 530, Criminal Procedure Code, and the case might be retried under section 403, Criminal Procedure Code, and it was held that it was not necessary for the High Court to upset the acquittal before a retrial could be had.

In *Queen-Empress v. Balwant* ‡ a full Bench of the Allahabad Court held that the High Court has power to revise an order of acquittal and to order a retrial or make any other order that might be made by a Court of Appeal except to convert an acquittal into a conviction.

The Madras case merely affirmed the general rule that an appeal against an acquittal by way of revision is not contemplated by the Code and should not, on public grounds, be encouraged. In that case an accused person had been acquitted by a Court of Session concurring with the assessors: no appeal was preferred by Government against the acquittal and it was sought by private persons to put the High Court in motion to interfere in revision.

* I. L. R., 8 Cal., page 895—1882. | † I. L. R., 8 Bom., page 307—1884.

‡ I. L. R., 9 All., page 134—1886. | § I. L. R., 14 Mad., page 363.

Criminal Procedure 403 (4), 530 (p), 537.

There is nothing inconsistent as it seems to me in these different decisions. As a general rule the High Court will not interfere in revision with an order of acquittal, but it has the power to do so; and there can be no doubt that this power may be properly exercised in particular cases.

NGA PO HAN
v.
NGA TBA LE NI.

Where a trial has been held without jurisdiction, as in the present case, or in the Bombay case above cited, it appears to be very proper that an order in revision should direct a new trial. The refusal of the Bombay Court to make such an order does not commend itself to me as practical. If the High Court does not order a retrial who is to initiate the new proceedings? Who is to say that the order of acquittal is void? It may not be necessary, but it is certainly expedient that the High Court should do so. An appeal might, no doubt, have been preferred on behalf of Government in the present case, but this has not been done and section 439 (5), Criminal Procedure Code, does not bar the present application.

In the circumstances of the case I am of opinion that an order in revision is more appropriate than appellate proceedings. The Magistrate having been without jurisdiction the most that could be done in appeal would be to order a retrial, and this can be done more conveniently and expeditiously in the exercise of the Court's revisional powers.

It has been the practice of this Court to follow the general rule and not to interfere in revision with orders of acquittal. But it has made an exception in cases where there has been a serious error of law, *e.g.*, where a mistaken application of a circular of this Court was made and persons accused of illegal gambling were acquitted* in consequence, or where the composition of an offence was improperly allowed,† or where a Magistrate omitted to give due weight to the presumption created by section 7 of the Gambling Act and threw the burden of proof on the accused person and acquitted him.‡

In all such cases it has been the practice of this Court to order a retrial. It is urged on behalf of respondents that section XV, Upper Burma Criminal Justice Regulation, and section 537, Criminal Procedure Code, are applicable, and that there was no failure of justice—the question of Jurisdiction is raised too late. I hold that sections XV, Upper Burma Criminal Justice Regulation, and 537, Criminal Procedure Code, do not cover a radical defect, such as want of jurisdiction to try an offender. Their intention is to prevent unimportant irregularities from being set up as ground for interfering with orders, &c., passed by a Court of competent jurisdiction (*see* section 537). Section 530 (p) holds good and section 403 (4), Criminal Procedure Code, applies to this case.

I set aside the order of acquittal and direct a retrial before the District Magistrate, or, if the District Magistrate thinks it undesirable that he should try the case, a commitment to the Court of Session.

* Criminal Revision No. 311 of 1900.

† Criminal Revision No. 364 of 1900.

‡ Criminal Revisions Nos. 1001 and 1085 of 1900.

Criminal Procedure—408 (b).

Criminal Procedure—408 (b).

Criminal Appeal

No. 9 of

1898.

October

17th.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. NGA TUN BAW AND TWO OTHERS.

Criminal Procedure 408 (b)—Cases in which a sentence of transportation or of imprisonment for more than four years is passed—Appeal or appeals shall lie to the High Court.

The accused was convicted with others in June 1898, and sentenced each to rigorous imprisonment for four years and to receive 30 stripes. At the same trial four other accused were sentenced to terms of imprisonment exceeding four years. The present appellants did not appeal till after the Code of Criminal Procedure, 1898, came into force, and on presentation of their appeals a question arose whether they lay to the Sessions or to the High Court.

Held—that the intention of proviso (b) to section 408, Code of Criminal Procedure, is that in a case in which a sentence of transportation or of imprisonment for more than four years is passed, any appeal or appeals in the case shall lie to the High Court.

Reference.—General Clauses Act, 1897, section 13.

THE three appellants, Tun Baw, Po Kin, and Tha Zan, whose appeals have been heard together, were convicted with others, on 10th June 1898, and sentenced each to rigorous imprisonment for four years and to receive 30 stripes. At the same trial four other accused were sentenced to terms of imprisonment exceeding four years. Under the law in force at the time, the latter sentences required the confirmation of the Sessions Judge. The present appellants did not appeal till after the Code of Criminal Procedure, 1898, came into force. On presentation of their appeals a question therefore arose whether they lay to the Sessions Court or to this Court. Under the Code of 1882 there would have been no doubt on the subject. But the wording of section 408 of the Code of 1898 is different from that of the same section in the previous Code. The section lays down the general rule that any person convicted by the District Magistrate or Magistrate of the first class (to put the case briefly) may appeal to the Court of Session; but this is subject to the proviso that when in any case, a Magistrate specially empowered under section 30 passes any sentence of transportation or of imprisonment for a term exceeding four years, the appeal shall lie to the High Court. This proviso has been construed to mean that if, in the same case, a District Magistrate sentences *A* to imprisonment for five years and *B* to imprisonment for three years, *A*'s appeal lies to the High Court and *B*'s to the Court of Session. I do not think that this is the intention of the law. Under section 13 of the General Clauses Act, 1897, words in the singular include the plural. I therefore think that the intention of the proviso is that in any case in which a sentence of transportation or of imprisonment for more than four years is passed, any appeal or appeals in the case shall lie to the High Court. It would obviously be very inconvenient and would certainly cause delay and possibly

Criminal Procedure—408 (b).

serious hardship, if appeals in the same case were to lie to different courts. The construction which I place upon the proviso is warranted by the wording of it and should be adopted until it is shown to be erroneous. I have therefore accepted these appeals and taken the opportunity of interpreting proviso (b) of section 408, Code of Criminal Procedure, for the guidance of Courts in Upper Burma.

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QUEEN-EMPRESS
v.
NGA'TUN BAW.

Criminal Procedure—437.

Criminal Procedure—437.

Before G. W. Shaw, Esq.

NGA PO GAUNG v. KING-EMPEROR.

Mr. C. G. S. Pillay—for applicant. | Mr. H. M. Lütter—for the Crown.

Discharge by Magistrate—Retrial for same charge a month later and ultimate conviction—No notice given to accused—Legality of subsequent proceedings.

Applicant was sent up for trial under section 325, Indian Penal Code, and discharged by the Township Magistrate on the ground that only one witness (complainant himself) was able to identify applicant as the man who caused the injuries. Applicant was then a month later sent up for trial again on the same charge and was ultimately convicted under section 325, Indian Penal Code, by the Subdivisional Magistrate and sentenced to four month's rigorous imprisonment and a fine of Rs. 30, or in default one month's rigorous imprisonment.

An appeal to the Sessions Court was dismissed.

The grounds of this application among others were—

- (i) that applicant was sent up a second time for trial without notice to him to the same Magistrate and then the case was transferred to the Subdivisional Magistrate;
- (ii) that the case could not be reopened because there was no order of a Superior Court setting aside the Magistrate's order of discharge.

Pointed out—That a case cannot be tried a second time after an order of discharge has been passed, without the order of the District Magistrate (section 437, Criminal Procedure Code).

Held—That it was plain that the District Magistrate did order the second trial. It was referred to him several times for his orders and it appeared from the record that he first gave a verbal order on inspection of the proceedings and subsequently passed an order, on a reference from the Magistrate asking for instructions whether he was to proceed with the second trial or not, transferring the case to the Subdivisional Magistrate. These two orders were both virtually orders under section 437, Criminal Procedure Code.

Pointed out—That it was to be regretted that the District Magistrate did not record a formal order under section 437. It is not expressly laid down in the Code that this shall be done, but it is obviously the proper thing to do.

Held also—That section 437, Criminal Procedure Code, does not expressly require notice to be given to an accused person. But it has been well enough understood that ordinarily notice should be given. The District Magistrate's omission to give applicant notice before passing his order directing further enquiry was regrettable, but it did not make the retrial illegal.

References—

- 1, U. B. R., 1892—96, page 48.
- 1, L. R., 19 Bom., page 247.

APPLICANT was sent up for trial under section 325, Indian Penal Code, and discharged by the Township Magistrate on the ground that only one witness (complainant himself) was able to identify applicant as the man who caused the injuries.

Applicant was then a month latter sent up for trial again on the same charge and was ultimately convicted under section 325, Indian Penal Code, by the Subdivisional Magistrate and sentenced to four months'

Criminal Revision
No. 320 of
1901.
July
16th.

Criminal Procedure—437.

rigorous imprisonment and a fine of Rs. 30, or in default one month's rigorous imprisonment.

NGA PO GAUNG
v.
KING-EMPEROR.

An appeal to the Sessions Court was dismissed.

The grounds for the present application are—

- (1) that applicant was sent up a second time for trial without notice to him to the same Magistrate and then the case was transferred to the Subdivisional Magistrate;
- (2) that the case could not be re-opened because there was no order of a superior Court setting aside the Magistrate's order of discharge;
- (3) that the evidence against him was contradictory and undeserving of credit;
- (4) that the evidence for the defence ought not to have been rejected;
- (5) that grievous hurt was not proved;
- (6) that the sentence was excessive.

On the first two points I concur with the learned Sessions Judge.

It has been held by this Court in *Queen-Empress vs. Po Nyein** that a case cannot be tried a second time after an order of discharge has been passed without the order of the District Magistrate (under section 437). But it is plain that in the present case the District Magistrate did order the second trial. It was referred several times for his orders and it appears from the record that he first gave a verbal order on inspection of the proceedings, and subsequently he passed an order on a reference from the Magistrate asking for instructions whether he was to proceed with the second trial or not, transferring the case to the Subdivisional Magistrate for trial. These two orders were both virtually orders under section 437. It is quite clear that the District Magistrate intended to order the second trial because he had enquired into the circumstances which were thought to make a second prosecution advisable.

It is to be regretted that the District Magistrate did not record a formal order under section 437. It is not expressly laid down in the Code that this shall be done, but it is obviously the proper thing to do, and the omission to do it leads, as it has led in this case, to great inconvenience.

In regard to notice, section 437, unlike section 439, Criminal Procedure Code, does not expressly require notice to be given. But it has been well enough understood that, ordinarily, notice should be given. The District Magistrate's omission to give applicant notice before passing his order directing further enquiry was again regrettable, but it did not make the re-trial illegal.

There was no distinct evidence on the record that complainant Nga Kala was in severe bodily pain or unable to follow his ordinary pursuits for 20 days, or that his injuries endangered his life, or resulted in permanent disfigurement of the head or face, any or all of which consequences may have ensued. The Township Magistrate, who originally

*1, U. B. R., 1892—96, page 48.

Criminal Procedure—437.

NGA PO GAUNG
v.
KING-EMPEROR.

tried the case, was guilty of a culpable omission in failing to examine the Hospital Assistant. At the time of the second trial the Hospital Assistant was a different man.

The result is that there is no medical evidence of any value on the record and the Subdivisional Magistrate omitted to supply the defect by taking evidence to show the extent of the injuries.

If the Hospital Assistant, who attended to Nga Kala, could not conveniently have been got at, there must have been other evidence available.

If, as it is stated, Nga Kala's life was despaired of and his dying deposition was taken, this could have easily been proved, and again expert evidence was probably not necessary to show whether Nga Kala was unable to follow his ordinary pursuits for 20 days.

The learned Sessions Judge says: "I think the fact that the complainant was in hospital for 32 days is ordinarily sufficient to prove grievous hurt." This is not the view which has been taken by this Court, or by other High Courts, see Criminal Revision No. 1038 of 1900 of this Court and *Queen-Empress v. Vasta Chela*.* Obviously, for purposes of careful treatment, a man may remain in hospital long after he is in a fit state to go about his ordinary business. It is urged that the fact that Nga Yôn was discharged from hospital in less than 20 days shows that here there was no unnecessary detention in hospital. But it does not show that Nga Kala was unable to follow his ordinary pursuits for 20 days and this cannot be presumed.

I remand the case for evidence to be taken showing the extent of Nga Kala's injuries and whether, and, if so, how they amounted to grievous hurt.

When a man strikes another three blows on the head with a stick, so severe as to cover him with blood and result in grievous hurt, he must be presumed to have either intended or known himself to be likely to cause grievous hurt. If the hurt therefore was grievous the offender in this case was clearly guilty of voluntarily causing grievous hurt.

As to the evidence showing that applicant was the man who caused the injuries, I do not see any reason to doubt the correctness of the findings of the Lower Courts. Nga Kala's story is coherent and probable in itself. He knew applicant perfectly and had opportunity to recognize him, when striking Nga Yôn the second time and when striking him (Nga Kala) the successive blows he received. He stated as soon as he got home that it was (applicant) Nga Po Gaung who had struck him and Nga Yôn, and Nga Yôn similarly stated that he thought it was (applicant) Po Gaung. The witness Nga Yi's evidence furnishes corroboration, and so, I think, do the arrangements made for a composition. If applicant had been an entirely innocent party, it is highly improbable that he would have permitted his relatives to consent to compensation being paid by him, or that his relatives would have made such an agreement on his behalf.

* I. L. R., 19 Bom., 247.

Criminal Procedure—437.

The punishment was by no means excessive, having regard to the circumstances and to the injuries inflicted, even as they are described at present.

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v.
KING-EMPEROR.

The case depends on whether the hurt was grievous. The proceedings will be resubmitted before the 20th June next.

* * * * *

Further evidence has now been taken and the Magistrate has found that the hurt caused was grievous by reason of the injured man Nga Kala being unable to follow his ordinary pursuits for 20 days. This conclusion is clearly justified by the evidence, which leaves no room for doubt on the point.

The application is therefore dismissed as regards the conviction under section 325, Indian Penal Code, for voluntarily causing grievous hurt to Nga Kala. In regard to the conviction of voluntarily causing hurt to Nga Yôn, this has not been considered in the remarks that have been made in the Sessions Court or above in this Court or in the arguments of counsel.

It appears that Nga Yôn was a party to the petition asking leave to compound. It seems to me that this must be considered binding, the power of compounding an offence under section 323 being given absolutely to the injured party.

I therefore set aside the conviction and sentence passed under section 323, Indian Penal Code, and direct that the fine, if paid, be refunded.

The applicant will be remanded to jail to serve out his sentence of four months' imprisonment under section 325, Indian Penal Code.

Criminal Procedure—437, 440, 350.

Criminal Procedure—437, 440, 350.

Before H. Thirkell White, Esq., C.I.E.

Criminal Revision
No. 955 of
1900.
October
1st.

- (1) NGA AUNG MYAT
- (2) NGA SAN DAIK
- (3) MI EIN HMI
- (4) MI ON BWIN
- (5) MI PET MI
- (6) NGA PO SHIN
- (7) NGA KA
- (8) NGA MYIT
- (9) NGA PWA
- (10) NGA TWA
- (11) NGA PO THIT
- (12) MI EIN BU

v. QUEEN-EMPRESS.

Mr. C. G. S. Pillay—for applicants.

Mr. H. M. Lütter, Government Pro-
secutor,—for the Crown.

Power of District Magistrate to enquire under section 437, Code of Criminal Procedure—Accused should ordinarily be given an opportunity of showing cause against further enquiry—evidence already recorded by another Magistrate cannot be used in further enquiry.

The accused were prosecuted before the Headquarters Magistrate for rioting under section 147, Indian Penal Code, and were discharged. The District Magistrate made further enquiry into the case, and after taking additional evidence charged and convicted the accused.

Held—that where further enquiry is made under section 437, Code of Criminal Procedure, by a Magistrate who has not already dealt with the case, the evidence already recorded cannot be treated as evidence in the further enquiry, but the enquiry must be taken up from the beginning, whether the accused wishes it or not.

Held also—that under section 437, Code of Criminal Procedure, the District Magistrate has jurisdiction himself to make further enquiry, and that there was no reason why he should not have done so.

Held also—that it is not legally necessary to give the accused an opportunity of showing cause before taking action under section 437, Code of Criminal Procedure, but that the Court should usually give the accused an opportunity of being heard.

References—

I. L. R., 10 Bom., page 131.

—9, Allahabad, page 52.

—20, All., page 339.

—15, Cal., page 608.

4, Calcutta Weekly Notes, page 100.

2, Bomday Law Reporter, page 586.

THE accused were prosecuted before the Headquarters Magistrate for rioting and were discharged. The District Magistrate made further enquiry into the case and, after taking additional evidence, charged and convicted the accused. The grounds on which this Court is asked to revise the proceedings of the District Magistrate are (1) that the District Magistrate should not have tried the case; (2) that the accused should have been given an opportunity of showing cause against further enquiry before the District Magistrate passed orders.

Criminal Procedure—437, 440, 350.

under section 437, Code of Criminal Procedure; (3) that the convictions are wrong on the merits; (4) that the sentences are too severe and (5) that the accused should not have been required to furnish security to keep the peace. NGA AUNG MYAT
v.
QUEEN-EMPRESS.

Before dealing with these objections I notice one point which was not taken by the learned Advocate for the applicants. The District Magistrate proceeded partly on the evidence recorded by the Headquarters Magistrate. This was done with the explicit and recorded consent of the Advocate for the accused; and that is no doubt the reason why no objection to the procedure was taken in this Court. But the procedure is certainly incorrect. Where further enquiry is ordered to be made under section 437, Code of Criminal Procedure, by the Magistrate who has already dealt with the case, he is entitled to act on the evidence already recorded by him: but when the case is taken up by the District Magistrate himself, or sent to a Magistrate other than the Magistrate who first dealt with it, the evidence already recorded cannot be treated as evidence in the further enquiry. Section 350 of the Code of Criminal Procedure does not apply. The District Magistrate should therefore have taken up the enquiry from the beginning. The irregularity is not cured by the consent of the Advocate for the accused; and it will be necessary to consider whether, apart from the evidence which has been wrongly admitted, there is sufficient evidence to justify the conviction.

I think that the District Magistrate had jurisdiction to try the case, and that there is no reason why he should not have done so. The section (437) plainly empowers the District Magistrate himself to make further enquiry.

The question whether it is necessary to give the accused an opportunity of showing cause before making or directing further enquiry under section 437, Code of Criminal Procedure, has been much discussed. In the *Queen-Empress v. Dorabji Hormasji**, the High Court at Bombay held that it was not necessary to give notice to the accused before an order was made under this section, and that the District Magistrate's order was not bad for want of this notice. In the *Queen-Empress v. Chotu*†, the High Court at Allahabad ruled that the person who has been discharged should always be allowed an opportunity of showing cause why there should not be further enquiry. In the *Queen-Empress v. Ajudhia*,‡ in the same High Court, the learned judge reversed a conviction on the ground that notice had not been given to the accused. In the case of *Hari Dass Sanyal v. Saritulla*§ a Full Bench of the High Court at Calcutta held that, under the law, no notice to the accused is necessary before an order under section 437, Code of Criminal Procedure, can be passed; and that the omis-

*I. L. R., 10, Bom., page 131.

†———9, All., page 52.

‡———20, All., page 339.

§———15, Cal., page 608.

Criminal Procedure—437, 440, 350.

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v.
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sion to give notice does not necessarily affect the legality of an order under that section. At the same time it was held that a Court failed to exercise proper discretion if it did not give the accused an opportunity of showing cause. In a very recent case (*Ralto Singh v. Kari Singh**) referring, it is understood, to this judgment, the same High Court interpreted it as a ruling that the omission to give notice to the accused was fatal to the validity of an order under section 437. But in a still more recent case (*Queen-Empress v. Gajankan*)† the High Court at Bombay followed its previous ruling above cited and remarked as follows:—

“It is true that under section 437 the issue of notice is not compulsory, and that having regard to the provisions of section 440, the accused in revisional proceedings cannot claim as of right to be heard. * * * * *

“But, although a Magistrate may have jurisdiction the manner in which his powers ought to be exercised remains one of judicial discretion dependant on the circumstances of each case. Instances may be suggested in which the issue of notice to the accused might be unnecessary or inexpedient, as, for example, if it gave an opportunity of escape to a suspected murderer, or if new evidence has been obtained which clearly necessitated the re-opening of the proceedings; but the present case is not one of them.”

The conclusion to be drawn is that it is not legally necessary to give the accused an opportunity of showing cause before taking action under section 437, Code of Criminal Procedure, but that in the exercise of its discretion under section 440 of the Code, the Court should usually hear the accused if he desires to show cause. It is a question in each individual case whether notice should be given or not. And though, as a matter of practice, notice should usually be given, I do not think that the omission to give notice can be held to invalidate the order or action of the Court, unless there is reason to think that the accused have been prejudiced thereby. In the present case, I do not think it has been shown that the accused were in any way prejudiced by the District Magistrate's omission to call upon them to show cause, and I see no reason for reversing the convictions on this ground.

On the merits, I am not prepared to say that there is not sufficient evidence to support the conviction apart from the evidence recorded by the Headquarters Magistrate on which the District Magistrate has not relied. In revision I do not think it is necessary for me to discuss the case on the merits further than this. The sentences do not seem to me to be too severe and I think the order requiring the accused to furnish security to keep the peace was a very reasonable one. It should be noted, however, that imprisonment in default of security for keeping the peace must be simple [section 123, sub-section (5), Code of Criminal Procedure].

The application for revision is dismissed.

*4 Calcutta Weekly Notes, page 100.

†2, Bombay Law Reporter, page 586.

Criminal Procedure—439.

Criminal Procedure—439.

Before G. D. Burgess, Esq., C.S.I.

MAUNG SEIN AND ANOTHER *v.* MAUNG HMO AND TWO OTHERS.

[For the second part of this judgment see page 349.]

Criminal Procedure Code 439—Revision—Application for revision of order of acquittal refused when application not received till time allowed by law of limitation for appeal from acquittal had all but expired.

Criminal Revision
No. 329
1897-
March
24th.

In this case there was an acquittal, not a discharge.

The application for revision came before the Court within a few days of six months after the order was passed and an appeal against the acquittal was virtually time-barred. The High Court declined to entertain the application as it would require very strong reasons to induce it to interfere in revision, though it could, of course, do so if necessary, after the period allowed for an appeal had expired under the law of limitation.

No one has appeared, and it is needless to put the petitioners to the trouble of attending this Court. The District Magistrate is requested to communicate the substance of the following orders to them.

In this case there was an acquittal, not a discharge.

It is now within a few days of six months since the order was passed, and an appeal against the acquittal is virtually time-barred.

It would require very strong reasons indeed to induce me to interfere in revision, though the High Court can, of course, do so if necessary, after the period allowed for an appeal has expired under the law of limitation.

A previous order made for a re-hearing of the case was quashed as irregular on the District Magistrate's own motion, and the District Magistrate did not on that occasion ask for any further orders.

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Criminal Procedure—488.

Criminal Procedure —488.

Before G. D. Burgess, Esq., C.S.I.
MA THE v. MAUNG THA E.

Criminal Revision
No. 513 of
1897.
May
18th.

Mr. C. G. S. Pillay—for applicant. | Mr. S. C. Dutta—for respondent.

Criminal Procedure Code, 488 Maintenance—Cancellation of order for—Refusal of wife to live with her husband without sufficient reason—Ground for—Cruelty habitual—What does not constitute—sufficient reason—What is and what is not—Claim of wife under Buddhist law to live in separate establishment not sustainable.

The applicant obtained an order for maintenance against her husband, the respondent, under section 488 of the Code of Criminal Procedure. The parties had both been married before—*Eindaunggi*—and had families of children.

After the order was made the applicant went to live with the respondent for a week, at the end of which she left him again. Then, on the application of the respondent, the Magistrate cancelled the order for maintenance previously passed in applicant's favour on the ground that without any sufficient reason applicant refused to live with her husband.

Against this order the present application for revision was made in which the applicant pleaded as reasons for her not living together with the respondent that she had been habitually treated with cruelty, that the order for maintenance was originally made on the basis of her being entitled to live in a separate establishment and that respondent had a chief wife and had lately taken another wife.

Held—First, on the facts that the Magistrate's order cancelling the order for maintenance was correct according to the provisions of the Code, no habitual cruelty having been made out.

Secondly, that the mere facts of the respondent having a chief wife and having added a third, assuming he was at liberty to take more than one wife at all, did not constitute cruelty on his part, nor entitle the applicant, who had chosen to unite herself to a man already legally married, to object to live with him or to claim to live apart, and that the claim to a separate establishment was unsustainable in criminal law.

No other ground than habitual cruelty or adultery could be treated as sufficient reason for the refusal of a wife to live with her husband under section 488 of the Code.

Quære—Whether returned to co-habitation after an order for maintenance would not have the effect of putting an end to all previous proceedings under section 488, and of bringing about a state of affairs from which a fresh starting point must be taken with regard to maintenance.

References ;—

- 6N. W. P. R., page 205;
- I. L. R., 1 Bom., 164;
- I. L. R., 11 All., 480; and
- Weekly Notes, All., 1888, page 217.

This application for revision is directed against the order of the Magistrate cancelling an order for maintenance previously passed in applicant's favour.

Since the order of maintenance was made the applicant has gone to live with respondent for a week at the end of which she left him again.

It is questionable whether such co-habitation would not have the effect of putting an end to all previous proceedings under section 488 and of bringing about a state of affairs from which a fresh starting

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point must be taken with regard to maintenance, and there is, actually a case to this effect quoted from Weekly Notes, 1888, page 217, All.

The Magistrate has not, however, proceeded upon any such ground but on the ground that applicant now refuses to live with her husband without any sufficient reason. The reason set up by the applicant was cruelty, which the Magistrate found not to be established, and he was perfectly right, because the only independent evidence of anything of the kind related to such childish matters as the applicant being obliged to make her food of a cracked plate and as the respondent kicking over a cooking-pot.

Moreover, the applicant gave respondent's house a trial for only a week, and it is ridiculous to try to build up a charge of habitual cruelty on such flimsy materials for such a very short period.

That any other reason than habitual cruelty or adultery can be treated as sufficient reason under section 488 the learned advocate for applicant has been unable to show any authority, whereas the learned advocate for respondent has been able to quote cases* in the reports on the other side.

The mere fact that the respondent's house might not be a very comfortable abode for applicant, seeing that they have both been married before—*Eindaunggyi*—and have families of children, though an unpleasant circumstance, of course, would not, with the greatest latitude of interpretation, constitute a circumstance imputing cruelty to respondent.

The Magistrate's order was therefore correct according to the provisions of the Code.

The argument of applicant's learned advocate has, however, extended to the contention that the order of maintenance was originally made on the basis of the applicant being entitled to live in a separate establishment, and to the objection of the husband's having a chief wife and having taken another lately, as a cause, for not living together.

It may be said, however, at once that the former argument is quite unsustainable in proceedings under the special provisions of the criminal law relating to maintenance, whatever weight it might have in a civil suit for alimony.

As to the second point, it comes very inappropriately from the mouth of a woman who was chosen to unite herself to a man already legally married to one wife; and, if a man is at liberty to take a second wife at all, the same liberty must exist with respect to a third wife, so that applicant has no kind of reasonable ground for complaint whatever, but should regard herself as fortunate in being allowed the position of a wife at all in the first instance. There is thus no good cause for interference on any point and the application for revision must be dismissed.

MA THE
v.
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*6, N. W. P. R., page 205, I.L.R., 1 Bom., page 164.
I.L.R., 11 All., page 480.

Criminal Procedure—488.

Criminal Procedure—488.

Criminal Revision
No. 447 of
1897.
July
7th.

Before G. D. Burgess, Esq., C.S.I.

MAUNG SAN (APPLICANT) *v.* MA WE (RESPONDENT).

Criminal Procedure Code, 488—Maintenance—Divorce under Buddhist law and Burman custom—Effect of—Questions to be considered—Obligation imposed by statute extends only to providing sufficient means of support—Claims beyond this are matter for Civil and not Criminal Courts.

The applicant, one Maung San, was ordered to pay Rs. 8 per mensem for the maintenance of his two children by one Ma We, formerly his wife, from whom he had been divorced after the usual Burman fashion.

The order passed by the Magistrate was as follows:—

“I think that Ma We and her witnesses have clearly proved that Maung San, the defendant, who admits being the father of her two children, has property amounting to upwards of Rs. 1,000. It is true that Maung San denies having property worth that amount, but the witnesses he produced have totally failed to rebut the evidence produced by the complainant and to support his statement. Maung San says that he is a cartman and that he has pawned his cart and bullocks, and that his income is about Rs. 15 per mensem. This income added to the produce of his landed property would, I think, enable him to support the two children which he got by the complainant. The point for consideration is whether Rs. 5 monthly, which the complainant has asked for the subsistence allowance of each of her children, is high or moderate. In my opinion I think it is a little too high and I think Rs. 4 for each child or Rs. 8 per mensem for the two children a sufficient allowance. I therefore order Maung San to pay Rs. 8 per month for the maintenance of his two children, which he got by the complainant Ma We.”

Pointed out—That as the parties had been divorced in the usual Burman fashion it was a question whether provision had not already been made for the maintenance of the children of the marriage by the arrangement concluded at the time of divorce or by the decree in a subsequent civil suit between the parties, and that this matter ought to be considered.

Pointed out—Further that this was not a civil action in which the issue was as to the social standing of the wife and the amount of alimony which was appropriate to the position of herself and her husband.

The questions were whether the husband had sufficient means to support his children, who were infants, and what sum was required for their support and no enquiry had been made on the latter point.

The law of maintenance in conjunction with the Buddhist law of divorce raises various questions of no little difficulty which demand careful consideration and cautious treatment. Order set aside with directions for further enquiry.

The parties have now had an opportunity of making such representations as they wish in the matter.

The parties have been divorced in the usual Burman fashion, and it is a question whether provision has not been made for the maintenance of the children of the marriage by the arrangements concluded at the time of divorce or by the decree in a subsequent civil suit between the parties. This is a matter which ought to be considered.

Besides this it does not appear that the Magistrate has dealt with the case from the right point of view.

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This is not a civil action in which the issue is as to the social standing of the wife and the amount of alimony which is appropriate to the position of herself and her husband.

The questions are whether the husband has sufficient means to support his children, and what sum is required for their support.

The children are infants of the ages of three years and ten months respectively, so that the question of the amount necessary for their keep ought to be a simple one. This the Magistrate has not, however, ascertained, and he ought to have done so by such enquiry as was necessary. That more than this can be claimed from the father there is no authority cited by the Magistrate to show, but if he has any such authority to bring forward or any principle of law or justice bearing on the point to rely upon, he is of course still at liberty to do so.

The position created by the system of divorce under Buddhist law prevalent in this country raises questions of much difficulty in maintenance cases, some of which have already been dealt with in the judgments of this Court, published in circulars, and to these the Magistrate should refer, and he must be guided by them so far as they go.

The whole subject requires very cautious and careful treatment.

The orders of the Subdivisional Magistrate are set aside with directions to make further enquiry and pass fresh orders under the instruction of the foregoing observations.

MAUNG SAN

v

A. E.

Criminal Procedure—488.

Criminal Procedure—488.

Before G. W. Shaw, Esq.

MAUNG MYA v. MA BOK SON.

Criminal Revision
No. 55 of
1901.
February
26th.

Mr. H. N. Hirjee—for applicant. | Mr. J. C. Chatterjee—for respondent.

Maintenance—Settlement between father and mother bar to claim for maintenance of child while property still exists and furnishes sufficient means for support of child.

The parties were married and had a child, a daughter, and three months after the birth of this child they were divorced by mutual consent. The applicant tried to show that at the divorce he gave his wife some gold and money for the maintenance of the child, but it was clear that they were not given for the maintenance of the child, but merely on a division of the property on divorce. A written agreement was at the same time entered into by the couple with respect to the custody and support of the child, that they should take it turn and turn about to keep and maintain it for periods of three years, the mother first. Within three months of the signing of the agreement the mother applied for and obtained maintenance for the support of the child.

Held—that where the father has made over certain property to the mother in consideration of her agreement to maintain the child, an order of maintenance would be rightly refused when the property still existed and furnished sufficient means for the support of the child.

Held also—that in the present case the property was not made over for the support of the child and though it had probably not been all expended when the application for maintenance was made the mother was clearly entitled under section 488, Criminal Procedure Code, to apply for maintenance.

References :—

S. J., L. B., page 145.

—page 362.

1, U. B. R., 1892—96, page 55.

THIS is an application, the object of which is to have an order of maintenance set aside or modified. The parties were married and had one child, a daughter, and three months after the birth of this child they were divorced by mutual consent. In the Magistrate's Court the applicant tried to show that at the divorce he gave his wife five tickals of gold and Rs. 99 for the maintenance of the child. But his own witnesses did not bear him out in this particular. Not more than three tickals of gold and Rs. 50 were given to the wife, and it is clear that they were given not for the maintenance of the child but merely on a division of the property on divorce. A written agreement was at the same time entered into by the couple with respect to the custody and support of the child that they should take it turn and turn about to keep and maintain (ဆေးဇေး) it for periods of three years, the mother first. Within three months of the signing of this agreement the mother applied for maintenance and the Subdivisional Magistrate, Myittha, ordered applicant to pay Rs. 5 a month.

In the Magistrate's Court the applicant cited the Lower Burma case referred to in Lower Burma Circular 85 of 1884. This was mentioned

Criminal Procedure—488.

in the Ruling of the Special Court in *Lugyi v. Mi Shwe Me*,* where it was held that a Burmese divorced wife was not barred from instituting proceedings for maintenance. A ruling more directly in point is that of this court in *Mi E Se v. Tha Tu*,† which has been cited on behalf of respondent. It was there ruled that proof of a settlement is not conclusive against a claim, but it is necessary to make enquiry into the present circumstances of the child and the father in accordance with the provisions of the section. In the case of *Mi Pye*,‡ which is mentioned with approval, in the ruling just referred to, Mr. Jardine said: "Cases may, however, be supposed where a Magistrate would not make an order. Suppose that a valid divorce takes place and the parties contract that the mother shall maintain the children in consideration of receiving certain property, a Magistrate would not immediately afterwards make an order on the father to maintain them unless it were shown that without such an order they would not be maintained at all. The Magistrates will not give a direct advantage to fraud. But in many cases after receiving the property the mother may in course of time become poor. In such cases, as the State has an interest in the maintenance and well being of children, the Magistrate may well order the well-to-do father to support his child." I take it that in the case supposed where the father has made over certain property to the mother in consideration of her agreement to maintain the child an order of maintenance would be rightly refused when the property still existed and furnished sufficient means for the support of the child.

MAUNG MYA
v.
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In the present case the property was not made over for the support of the child and though it had probably not been all expended when the application for maintenance was made, the mother was clearly entitled under section 488 to apply for maintenance. That she had means of her own is not to the point (see the ruling of this Court above cited). The applicant is admittedly the father. The child as an infant at the breast is unable to support itself. The father has sufficient means and he refuses to support the child on the plea of a special contract with the mother, which does not excuse him. The Magistrate was therefore right in making an order of maintenance.

In face of the rulings above cited it is unnecessary to consider the arguments of the learned advocate for the applicant that the mother, as a Burman Buddhist, having a superior right to the custody of a female child, is putting a penalty on the father by exercising her right to the custody of the child and then claiming maintenance. It is admitted that applicant cannot get rid of his obligation to support the child.

As to the amount awarded it is alleged on behalf of respondent that a wet nurse is necessary and that the cost comes to Rs. 2 or 3 a month and that "winter clothing" is required.

I am of opinion that Rs. 5 a month for an infant at the breast is excessive and reduce the amount payable to Rs. 2-8-0 per month.

* S. J., L.B., page 362. | † I. U.B.R., 1892-96, page 55.

‡ S. J., L.B., page 145.

Criminal Procedure—488.

Criminal Procedure—488.

Before G. W. Shaw, Esq.

MAUNG TUN *v.* MI DU HLAING.

Maung Pe—for applicant.

Criminal Revision
No. 814 of
1901.
October
5th.

Pregnancy by the same man who marries the woman not a bar to marriage under Mahomedan Law—Husband liable for maintenance of wife and child.

The applicant was married to the respondent according to Mahomedan Law. They were of age and freely consented. There was no legal impediment to the marriage and witnesses were present and dowry was paid. The applicant subsequently left the respondent. The respondent sued him and obtained maintenance for herself and her child. The applicant asserted that the requirements of the Mahomedan Law were disregarded as the respondent was pregnant when he married her, and therefore there was no legal marriage. There was not the smallest doubt that the applicant was himself the author of the pregnancy.

Held—That there was no authority for the assertion that pregnancy was a bar to marriage under the Mahomedan Law.

Where a woman is pregnant by fornication with the same man who marries her the marriage is lawful and connubial intercourse is not forbidden them.

Reference:—

Amir Ali and Woodroffe, Volume II, page 278.

THERE is no ground for admitting this application. The allegations that the requirements of the Mahomedan law were disregarded and therefore there was no legal marriage are without the smallest foundation. The parties were of age and freely consented. They expressly signified their consent in each other's presence and hearing. There was no legal impediment to their marriage. More was not required though in fact witnesses were present and dowry was paid to the woman's agent.

There is no authority for the assertion that pregnancy is a bar to marriage. I have searched all the standard works, Macnaghten, Baillie, Wilson and Amir Ali, and the only trace of any prescription on the subject is the doctrine, which is not the approved doctrine, that it is not permitted to marry a woman pregnant by another man in fornication. Here there cannot be the smallest doubt that applicant was himself the author of the pregnancy. The cohabitation is clearly proved and applicant's story is incredible. He would certainly not have gone through the marriage ceremony if he had not been the cause of the woman's pregnancy. Amir Ali (Volume II, page 278), says, "Where a woman is pregnant by fornication with the same man who marries her the marriage is lawful and connubial intercourse is not forbidden them. For this there is consensus . . . and the "*nasab*" (and legitimacy "of the child would be established in the "man if it is born at six months or more from the date of marriage."

The application is dismissed.

Criminal Procedure—488 (3).

Criminal Procedure—488 (3).

Before F. S. Copleston, Esq.

QUEEN-EMPRESS v. NGA BWA.

Criminal Procedure, 488 (3)—Mode of enforcement of order of maintenance.

In this case the accused was sentenced to a month's simple imprisonment under section 488 (3) of the Code of Criminal Procedure, although no warrant for levying the amount of the maintenance due had previously issued.

Held—That the order for imprisonment was illegal, and that it is only on account of the amount due after the execution of "the warrant" that imprisonment may be ordered.

Also it should have been shown that there had been *wilful neglect* to comply with the order of maintenance.

THE order for imprisonment appears to have been illegal because no warrant for levying the amount due was previously issued. It is only on account of the amount due after the execution of "the warrant" that imprisonment may be ordered [section 488 (3), Criminal Procedure Code]. The Magistrate should have recorded a finding with reasons to the effect that the person ordered to pay maintenance had *wilfully neglected* to comply with the order, a warrant should then have been issued, and finally the imprisonment should then have been ordered. This procedure was not followed.

Subjoined is the Magistrate's order:—

"Respondent was ordered by this Court to pay a monthly allowance of Rs. 5 per month to plaintiff (as a guardian) for the maintenance of her child. Plaintiff states that the respondent has neglected to pay anything for the last nine months. Respondent has been called upon to show cause why the order should not be enforced. Respondent admits his liability to pay, but states that he has been ailing for some time and therefore he has failed to pay. After the institution of this complaint ten days' time was given to the respondent to pay up the amount, but up to date he has failed to pay.

"It is therefore ordered that respondent Maung Bwa shall suffer one month's simple imprisonment."

Criminal Revision
No. 55 of
1899.
January
27th

Criminal Procedure—490.

Criminal Procedure—490.

Criminal Revision
No. 288 of
1898.
May
6th.

Before H. Thirkell White, Esq., C.I.E.

MA KIN v. MAUNG SHAN.

Criminal Procedure, 490—Enforcement of order of maintenance.

When application is made for enforcement of an order of maintenance the general rule laid down in *Mahbuban v. Fakir Bakhsh* (I.L.R., 15 All., 143) should be followed, unless it is shown that the order is no longer in force.

An order under section 488, Code of Criminal Procedure, cannot be set aside or modified by a Civil Court.

An order was made by the Subdivisional Magistrate for the payment of Re. 1 a month by Nga Shan for the support of his legitimate child. Under section 490, Code of Criminal Procedure, application was made to the Township Magistrate to enforce the order. The respondent Nga Shan produced a judgment of the Township Court in a civil suit to the effect that, if the defendant Ma Kin (the mother of the child and the person to whom maintenance for the child was to be paid) could not support the child she was to hand it over to the father. On this order, without assigning any specific reason, the Township Magistrate rejected the application to enforce the order for the payment of maintenance.

Held—That the Township Magistrate was wrong in rejecting the application. His order was accordingly set aside and he was directed to deal with the application on its merits.

When application is made for the enforcement of an order for maintenance, the general rule laid down in *Mahbuban v. Fakir Bakhsh* (15 All., 143) should be followed, unless it is shown that the order is no longer in force.

An order under section 488, Code of Criminal Procedure, cannot be set aside or modified by a Civil Court.

References.—

I. L. R., 6 W. R., Civil 57.

I. L. R., 20 W. R., Criminal 58.

I. L. R., 15 All. 143.

I. L. R., 19 All. 50.

In this case, an order was made by the Subdivisional Magistrate for the payment of Re. 1 a month by Nga Shan for the support of his legitimate child. Under section 490, Code of Criminal Procedure, application was made to the Township Magistrate to enforce the order. The respondent Nga Shan produced a judgment of the Township Court in a civil suit to the effect that if the defendant Ma Kin (the mother of the child and the person to whom maintenance for the child was to be paid) could not support the child, she was to hand it over to the father. On this order, without assigning any specific reason, the Township Magistrate rejected the application to enforce the order for the payment of maintenance.

The parties have been heard before the Subdivisional Magistrate with reference to the present proceedings. The child is still with his mother.

In submitting the proceedings, the Subdivisional Magistrate has referred to the cases reported in *Lalla Gopee Nath v. Mussamut Jeetun Kooer*,* *Subad Domni v. Katiram Dome†* and *Mahbuban v. Fakir Bakhsh.‡* The first case is not relevant. The second case,

* I. L. R., 6 W. R., Civil 57.

† I. L. R., 20 W. R., Criminal 58.

‡ I. L. R., 15 All. 143.

Criminal Procedure—490.

though decided with reference to the Code of 1872, is to the point. In that case the High Court of Calcutta held that the decree of the Civil Court could not affect the order of the Magistrate. In the third case the High Court at Allahabad held "that when a person in whose favour such an order (*i.e.*, an order for maintenance) has been given takes it before a Magistrate, and the Magistrate finds that he has jurisdiction owing to the residence of the person affected by the order, and is satisfied as to the identity of the parties and the non-payment of the allowance due, it is his duty to enforce the order for maintenance." This ruling, I may observe, has been considered and overruled in *Shah Abu Ilyas v. Ulphat Bibi*.^{*} The decision in the last case is to the effect that if, when an application for the enforcement of an order for the payment of maintenance to a wife is made, the respondent alleges that the woman has been lawfully divorced and is no longer his wife, it is the duty of the Magistrate to enquire into and decide upon the allegation. The principle upon which this decision is based is that the order is in its terms for the maintenance of a wife, and that, if the woman is no longer the wife of the respondent, the order is spent and consequently not enforceable.

While therefore the general rule laid down in *Mahbuban v. Fakir Bakhsh* would cover this case, the later ruling which supersedes it does not affect the point. When application is made for the enforcement of such an order, the general rule laid down in *Mahbuban v. Fakir Bakhsh*† should be followed, unless it is shown that the order is no longer in force. An order under section 488, Code of Criminal Procedure, cannot be set aside or modified by a Civil Court.

The order of the Township Magistrate is set aside and he is directed to deal with Ma Kin's application on its merits.

MA KIN
v.
MAUNG SHAN.

^{*} I.L.R. 19, All. 50. | [†] I.L.R. 15, All. 143.

Criminal Procedure—512.

Criminal Procedure (512).

Before G. D. Burgess, Esq., C.S.I.

NGA KYAW ZIN v. QUEEN-EMPRESS.

Criminal Appeal
No. 28 of
1897.
April
8th.

Criminal Procedure Code 512—Preliminary conditions requisite before a deposition purporting to have been recorded under the section can be admitted in evidence.

According to the judgment of the convicting court a man was seen sneaking out of the house with *pasos*, and the owner was warned, and found his *pasos* gone. He gave chase and was told by one of the witnesses, whom he met, that the accused had been seen going off with *pasos*. Accused was searched for and, it is said, seized wearing a *paso* like one of those stolen. He broke loose and escaped. Evidence was said to have been recorded under section 512, Code of Criminal Procedure. Two years afterwards accused was discovered in jail and, being tried and found guilty under section 380, Penal Code, with four previous convictions, was sentenced to seven years' rigorous imprisonment. The owner of the *pasos* being absent from his usual residence, his deposition was admitted under section 512, Code of Criminal Procedure.

Held—First, that there was nothing to show that the deposition so admitted had been recorded under section 512, Code of Criminal Procedure, by a Court competent to try, or commit for trial, the person accused for the offence complained of upon proof that such accused person had absconded and there was no immediate prospect of arresting him.

Secondly, that there was nothing to show that the deposition, supposing it to have been duly recorded in compliance with all the conditions laid down, could be given in evidence against the accused on this trial. Before a deposition recorded under section 512 can so be admitted in evidence, it must be proved that the deponent is dead or incapable of giving evidence, or that his attendance cannot be procured without an amount of delay, expense, or inconvenience, which under the circumstances of the case would be unreasonable, and here there was no proof of the kind. Without the evidence of the owner of the *pasos* there was no proof of the commission of theft nor of the connection of accused with any stolen property. Conviction and sentence accordingly reversed and re-trial by a competent Court ordered.

THERE appears to be no evidence here of the commission of an offence. The proceedings open with a paper purporting to be a deposition made by one Paw Tha, the alleged owner of the alleged stolen property, on which the District Magistrate has noted "Received as evidence 512, Criminal Procedure Code." There is nothing to show, however, that the statement was recorded under section 512 of the Code of Criminal Procedure by a Court competent to try or commit for trial the person accused for the offence and complained of upon proof that such accused person had absconded and that there was no immediate prospect of arresting him. In the second place, there is nothing to show that the deposition, supposing it to have been duly recorded in compliance with all the conditions laid down, can be given in evidence against the accused on this trial for the offence with which he is charged. Before a deposition recorded under section 512 can so be admitted in evidence it must be proved that the deponent is dead or incapable of giving evidence, or that his attendance cannot be

Criminal Procedure—512.

procured without an amount of delay, expense, or inconvenience, which under the circumstances of the case would be unreasonable. NGA KYAW ZIN
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Here there is no proof of the kind. A police constable merely said that he had been sent to call Paw Tha to give evidence in the case, and that he could not find him. The rest of this witness's statement, though it has been put on record, consists of hearsay. But even if there were admissible evidence that Paw Tha had gone to Lower Burma, that would not meet the requirements of the section. He ought to be searched for, and there is no good reason why the evidence of a witness in Lower Burma should not, somehow or other, be procured in Upper Burma.

Under these circumstances there has not been a proper trial. The remainder of the evidence is insufficient by itself to establish a connection between the accused appellant and the property alleged to have been stolen, and the proceedings are altogether defective.

Accordingly, the conviction and sentence on the appellant-accused Nga Kyaw Zin are reversed, and his re-trial by a competent Court is ordered.

Criminal Procedure—514.

Criminal Procedure (514.)

Before H. Adamson, Esq..

BINKOLOJEE v. QUEEN-EMPRESS.

Criminal Revision

No. 454 of

1899.

May

11th.

Criminal Procedure, 514—Procedure to be followed for forfeiture of bail bond.

The applicant was surety for an accused and executed a bail bond in a preliminary enquiry before a police officer for the attendance of the accused at the Magistrate's Court on a certain date. On the date fixed the accused attended the Court, but found it closed. The next day the case was called, but accused was not present; whereupon the Magistrate summoned the applicant, and, without hearing any evidence, referred to a statement made by the Superintendent of Police in a former case and summarily ordered the applicant to pay the penalty entered in the bond, namely, Rs. 25.

Held—that the Magistrate's procedure was entirely wrong. Section 514, Code of Criminal Procedure, requires that an order escheating a bail bond shall be made upon evidence duly recorded in the case and not upon evidence taken in other cases.

APPLICANT was surety for an accused person, Moradin, and executed a bail bond on a preliminary inquiry before a police officer for the attendance of Moradin at the Magistrate's Court on 14th April. The bond does not state which Magistrate's Court he was required to attend.

On the 14th April it appears the Courts were closed. On the 15th April Moradin's case was called and he did not appear. Proceedings were then taken against the surety, the present applicant. He was called on to show cause why the bond should not be forfeited. Applicant showed cause in a petition in which he alleged that Moradin came to Court on the 14th and found it closed; that he came again on the 15th and 17th and attended at the Honorary Magistrate's Court, thinking that was the Court which he had been required to attend.

The Magistrate, without hearing any evidence, referred to a statement made by the Superintendent of Police in a former case and summarily ordered applicant to pay the penalty stated in the bond, namely, Rs. 25.

The Magistrate's procedure was entirely wrong. Section 514, Criminal Procedure Code, requires that an order escheating a bail bond shall be made upon evidence duly recorded in the case and not upon evidence taken in other cases. Moreover, the applicant, who offered to call evidence in support of his statement, should have been allowed to do so.

Considering the loss of time and the expense that applicant has been put to in these proceedings, and also the fact that the accused person for who he was surety was produced in Court on the 18th April and duly tried, I think it unnecessary to return the case for further inquiry.

I set aside the Magistrate's order and direct that the sum forfeited, Rs. 25, be refunded to applicant.

Criminal Procedure—514.

Criminal Procedure—514

Before H. Thirkell White, Esq., C. I. E.

QUEEN-EMPRESS v. NGA HLA AND THREE OTHERS.

When the penalty of a bond is only partly enforced under section 514, Code of Criminal Procedure, part of the penalty being remitted, neither principal nor sureties are subjected to further liability on the bond.

*Criminal Revision
No. 906 of
1899.
September
12th.*

The accused Nga Hla executed a bond to be of good behaviour for a year. The bond was found to be forfeited and the sureties were required to pay the penalty of it, but this Court, in exercise of the discretion conferred by section 514, sub-section (5), of the Code of Criminal Procedure, remitted part of the penalty and enforced payment in part only. Instead of the full sum of Rs. 50, only Rs. 15 were in the end recovered from the sureties. Nga Hla has since again been convicted of an offence, and the Magistrate has recovered from his sureties the sum of Rs. 35, being the amount of penalty remitted by this Court.

Held,—That, when the penalty of a bond has been enforced, through only in part, neither the principal nor the sureties remain liable for the part of the penalty remitted.

Reference.—I. U. B. R., 1897—1901, page 26.

The facts of the case up to a certain point are stated in the order of this Court in Criminal Revision No. 1088 of 1898.* Nga Hla executed a bond to be of good behaviour for a year. The bond was found to be forfeited and the sureties were required to pay the penalty of it; but this Court, in exercise of the discretion conferred by section 514, sub-section (5), of the Code of Criminal Procedure, remitted part of the penalty and enforced payment in part only. Instead of the full sum of Rs. 50, only Rs. 15 were in the end recovered from the sureties. The District Magistrate appears to be in error in supposing that section 514 does not expressly provide for the recovery of a penalty in part only.

Nga Hla has now again been convicted of an offence; and the Magistrate has recovered from his sureties the sum of Rs. 35, being the amount of the penalty remitted by my predecessor. When the effect and reason of the order of this Court are thus stated, it will be obvious to the Magistrate that this action was irregular. The amount which he has now recovered from the sureties was formally remitted by this Court. It could not therefore be recovered under the Magistrate's order. The enforcement of the penalty of the bond put an end to the transaction as regards the persons who were bound by it.

The fact that part of the penalty was remitted, whether by the Magistrate or by this Court, did not operate to render the sureties still liable on a bond which had been forfeited. If it was considered necessary to do so, fresh proceedings under Chapter VIII of the Code of Criminal Procedure could have been taken. Until a fresh order was passed neither Nga Hla nor his former sureties were liable on any bond.

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v.
NGA HLA.

The Magistrate's order is set aside and the sum of Rs. 35 paid by them will be refunded to Po Thet, Tha Zan, and Tha Gywe. Any warrant or proclamation which may have been issued in respect of Nga Hla in connection with the bond should be withdrawn.

Criminal Procedure—514.

Criminal Procedure—514.

Before G. W. Shaw, Esq.

KING-EMPEROR *v.* NGA SHWE DAUNG, NGA AUNG AND NGA KAN.

Only one penalty of a bond—Accused and sureties not to be bound in several sums.

*Criminal Revision
No. 1205 of
1900.
January
7th.*

The accused Shwe Daung was charged with an offence under section 354, Indian Penal Code. During the Police investigation he executed a bond with two sureties to appear before the Subdivisional Magistrate at a time and place specified. The sum which the accused bound himself to pay in case of default was Rs. 25, but the sureties bound themselves each to forfeit Rs. 100 in case of his failure to attend. Shwe Daung made default and proceedings were taken under section 514, Criminal Procedure Code, to enforce the penalty of the bond.

The way this was done was to recover Rs. 200 from the sureties and Rs. 25 by distress warrant from Shwe Daung's property.

Held,—That the penalty of the bond was Rs. 25 only and that the engagement by which the sureties bound themselves to pay Rs. 100 each was unenforceable.

Reference.—I. U. B. R., 1897—1901, page 26.

One Shwe Daung was charged with an offence punishable under section 354, Indian Penal Code, and during the police investigation executed a bond with two sureties to appear before the Subdivisional Magistrate at a time and place specified. The sum which Shwe Daung bound himself to pay in case of default was Rs. 25, but the sureties bound themselves each to forfeit Rs. 100 in case of his failure to attend. Shwe Daung made default and proceedings were taken, under section 514, Criminal Procedure Code, to enforce the penalty of the bond. The way this was done was to recover Rs. 200 from the sureties and Rs. 25 by distress warrant from Shwe Daung's property.

The bond purports to have been executed under section 169, Criminal Procedure Code, but it is not clear whether it was really executed under section 169 or section 170, and the wording was defective as it runs in the words of the form without alterations to suit the circumstances of the case: "I hereby declare myself or we jointly and severally declare ourselves.....sureties, &c."

These, however, are not material points. The question is whether Rs. 225 could be recovered on the bond.

The District Magistrate has been given an opportunity of showing cause why the amounts in excess of Rs. 25 paid by the sureties should not be refunded and no cause has been shown.

There was clearly a misapprehension of the nature of a bond. Section 496, Criminal Procedure Code, provides for the release on bail of persons accused of bailable offences. Section 498 refers to the "amount of the bond" indicating that the accused should bind himself in a specific sum and that the sureties should bind themselves jointly and severally, or jointly, as the case may be, to pay the amount of the bond. Section 499 requires the execution of a bond

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for such sum of money as seems sufficient. Section 514 refers to "the penalty of the bond."

There is nowhere any indication that the accused and his sureties may be bound in several sums, or that there can be more than one penalty of a bond.

This was pointed out in the case of Nga Hla.* In this case I am of opinion that the penalty of the bond was Rs. 25 and that the engagements by which the sureties bound themselves to pay Rs. 100 each was unenforceable. The amount of the bond was recovered from Shwe Daung's property. The whole of the Rs. 200 paid by the sureties must therefore be refunded.

* Page 26.

Criminal Procedure—545.

Criminal Procedure—545.

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS v. MA PU.

*Criminal Revision
No. 338 of
1897.
April
28th.*

Code of Criminal Procedure, section 545 (b)—Application of fine in compensation for the injury caused by the offence committed—Conviction under section 10 of the Dramatic Performances Act, 1876, as amended by section 7 (e), Upper Burma Laws Act, 1886—A Court cannot arbitrarily award payment of a fine to cover a supposed loss, but only for one or other of the objects specified in section 545, Code of Criminal Procedure.

The facts were that the Municipality required certain fees to be paid by every person to whom permission was given to hold a *pwè* under section 10 of the Dramatic Performances Act as amended by section 7 (e), Upper Burma Laws Act, 1886.

The accused held several *pwès* without paying fees, and when she afterwards applied for a permit for another *pwè*, she was called on to make good the fees unpaid, which she did not do, but held the *pwè* without first obtaining leave. The District Magistrate imposed a fine of Rs. 30 on accused, and awarded Rs. 24 out of the amount to the Municipality.

Order for compensation quashed.

If the Municipality were not paid fees on the occasion of the *pwè* being held they would equally have been feeless if no *pwè* had been held, and apparently the compensation was calculated on arrears of fees not paid for other *pwès* and there was no injury for which compensation could be made.

ORDERS IN REVISION.

THE District Magistrate must be requested to specify the provision of law under which the order for the payment of a portion of the fine to the Municipality was passed.

Extracts from District Magistrate's Report.

"I directed that compensation should be paid to the Municipality, as they were the complainants in this case under section 545 (b), Criminal Procedure Code, as they suffered a loss of fees that were due to them, and which was recoverable by civil suit."

Read District Magistrate's report.

From the proceedings it would appear that the prosecution was instituted by the police and not by the Municipality.

But, however that may be, it is not clear how any injury to the Municipality or any one else was caused by the offence.

If the Municipality were not paid fees on the occasion of the *pwè* being held, they would equally have been feeless if no *pwè* had been held.

Apparently, also, the compensation was calculated on arrears of fees not paid for other *pwès*. If so, how could any injury in this way have been possibly caused by the present offence?

Furthermore, under what authority could the Municipality demand the payment of fees at all under the circumstances?

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Explanation of these matters may be awaited before orders are passed.

* * * *

Read District Magistrate's report.

As the District Magistrate is unable to show any authority for the order as to payment of part of the fine to the Municipality, the order must be quashed.

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Criminal Procedure—556.

G. D. Burgess, Esq., C.S.I.

NGA THAW *v.* QUEEN-EMPRESS.

Code of Criminal Procedure, section 555—"Personally interested"—What amounts to being—*

*Criminal Revision:
No. 42 of
1897.
February
11th.*

The Magistrate who tried this case had previously made two departmental enquiries into the allegations of the parties against whom accused was said to have offended and reported the result of the investigation to the District Magistrate. After the Magistrate had thus come to certain conclusions as to facts and had committed himself to two more or less decided expressions of opinion, it was not fair either to the Magistrate himself or to the accused that the trial of the latter should be held before the former. It is essential not only that there should be no personal interest or prejudice on the part of a Judicial Officer which would disqualify him from trying a particular case, but also that the mere appearance of prejudice should be avoided for the sake of protecting the administration of justice from the possibility of an imputation of partiality or unfairness.

Conviction and sentence quashed and re-trial of accused ordered.

It is not necessary to go into the merits of this case.

The Sessions Court in appeal has acknowledged the irregularity and embarrassment caused by the trial in the same cause of six different charges or counts.

The applicant-accused should have been charged under section 420, Indian Penal Code, and not under section 417, as has already been observed when the proceedings were previously examined in this Court before the present application for revision was made.

These objections might, however, be passed over, but the remaining objection which comes under section 555* of the Code of Criminal Procedure can hardly be waived. The Appellate Court has disposed of it by remarking that it could not be avoided as accused was the subordinate of various officers who had to deal with the matter executively. But such a circumstance is not sufficient to get rid of the difficulty.

The Sessions Judge and the District Magistrate may both administratively have been concerned in causing the prosecution of the accused, but this they might have been without raising any barrier to the subsequent exercise of their judicial functions.

But the Subdivisional Magistrate who tried the case was much more concerned in the preliminary proceedings than this. He made two departmental enquiries (Nos. 27 and 28, Criminal Miscellaneous cases) into the allegations of the parties against whom accused was said to have offended and reported the results to the District Magistrate.

In the former proceedings he says:—

"Under these circumstances, I am disposed to think that Maung Thaw (*i.e.*, accused) has received Rs. 7-2-0 in excess for process fees and diet money from Maung Kyauk, the 6th plaintiff, *plus* 6 annas, the diet money of Ma Shwe On."

[*Section 556 of the Code of Criminal Procedure, 1898.]

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—

In the second case he reports regarding accused's explanations—
“It is therefore evident that Maung Thaw's statement is without foundation.”

After having committed himself to these two more or less decided expressions of opinion it was not fair either to the Magistrate himself or to the accused that the trial of the latter should be held before the former.

I do not doubt that the Magistrate tried the case with impartiality, but how is it possible to say that a distinct effect had not already been produced on his mind by his previous investigation, and how could the Magistrate guard himself against the production and continuance of such an effect?

It is essential not only that there should be no personal interest or prejudice on the part of a Judicial Officer which would disqualify him from trying a particular case, but also that the mere appearance of prejudice should be avoided for the sake of protecting the administration of justice from the possibility of an imputation of partiality or unfairness.

Under such circumstances as the present, it can hardly be questioned that the trial of accused should have been before a Court the Judge of which was unconnected with the previous investigations into his conduct in the transactions concerning which he was to be charged with the commission of certain offences.

Accordingly, the conviction and sentence are set aside and the retrial of the accused applicant Nga Thaw is ordered to be had before a competent Magistrate on charges under sections 420, 409, and such other sections of the Penal Code as may be applicable, in separate cases or otherwise in accordance with law.

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Criminal Procedure—556.

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS *v.* NGA SÔK CHÛN AND THREE OTHERS.

Mr. H. M. Lütter, Government Prosecutor—for the Crown.

Criminal Procedure Code, 555,—191 (c),† 530(k)—Personally interested—Want of jurisdiction—Irregularities vitiating proceedings.*

Criminal Revision
No. 252 of
1897.
March
8th.

Prosecution under section 3 of the Public Gambling Act, 1867.‡

The Magistrate who tried this case because of information or knowledge possessed by himself applied for process against the accused. He was thus at the same time prosecutor and judge, and the spirit of section 555 was violated and its intention virtually defeated. It was impossible, therefore, to say that the accused were not, or were not liable to be, prejudiced by such a position of affairs. Conviction and sentence consequently quashed.

THE first accused appears and is heard. The other two accused do not appear to have been served with the notice issued. It will have to be explained why service was omitted.

The want of notice, however, does not seem of much importance, as the proceedings have been taken in the interests of the accused and not against their interests or to their prejudice. There was, indeed no need for the first accused to appear here, and he has only done so because he thought it was necessary. Was he given to understand, this? If so, it should be explained why this was done.

As I am engaged in calling such points in question, I may here take notice of the judgment in appeal in which the District Magistrate has referred to the character of the appellants improperly, and has employed language of which on reflection he will probably recognize the unbecoming nature.

The reference which has been made by the Court of Session challenges the conviction on the ground of want of jurisdiction under section 530 (k), Code of Criminal Procedure, the trying Magistrate having no authority under section 191 (c)† to take up the case without complaint or police report, of which there was neither in this instance. *Primâ facie* this objection would prevail, but the question arises whether the Subdivisional Magistrate, to whom the Township Magistrate made application for warrants, did not practically transfer the case to the Township Court by making the warrants returnable there, though he made no formal order of transfer.

This is a somewhat doubtful point, and I do not wish to decide it in the present case if it is not necessary to do so, as it might very well arise again in more important proceedings. And it is not necessary to determine it just now, because, as the learned Government Prosecutor concurs in thinking, this case can be disposed of on another ground.

[*Section 556 of the Code of Criminal Procedure, 1898.]

[†Section 190 of the Code of Criminal Procedure, 1898.]

[‡Section 12 of the Gambling Act, 1899.]

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The Magistrate who tried the case himself applied for process against accused, because of information or knowledge possessed by him of alleged breaches of the law on their part; that is to say, he practically acted both as prosecutor and judge in the case. It is easy to see how his mind would be biassed by what he did. After starting the prosecution and getting the accused arrested, he would naturally be most reluctant to stultify himself and his own action by finding that no offence was proved against the men whom he had personally accused. These circumstances bring the case under the provisions of section 555,* Code of Criminal Procedure—certainly the spirit of that section was violated and its intention was virtually defeated; it is impossible to say that the accused were not, or were not liable to be, prejudiced by such a position of affairs.

For these reasons the conviction and sentence on all the accused and the proceedings are quashed altogether.

The accused have already suffered sufficient punishment probably for any offence they may have committed, if any at all were committed, so that there need not be any order for a new trial. The case is an illustration of what I have pointed out on other occasions, namely, the danger of any other procedure in gambling cases than the special procedure provided for in the Gambling Act.

If it is necessary or proper to proceed under the general law against offences under section 3 of the Act,† why should the harsh measure of the issue of a warrant instead of a summons be taken as in the present instance.

[*Section 556 of the Code of Criminal Procedure, 1898.]

[†Section 12, Gambling Act, 1899]

Criminal Procedure—556.

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Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS *v.* NGA AUNG GYI.

Mr. H. M. Lutter, Government Prosecutor—for the Crown.

Criminal Revision
No. 539 of
1897.
Augt.
13th.

Criminal Procedure Code, 555, 487, 191†(c)—Conviction under Stamp Act, Section 61‡—for execution of a receipt chargeable with duty without the same being duly stamped—District Judge impounding document and sending it to Collector—Collector ordering prosecution before District Magistrate—District Magistrate trying the offender—District Judge, Collector, and District Magistrate being all the same officer—Whether jurisdiction of District Magistrate ousted by his previous proceedings in other capacities—Principles governing such cases.*

The accused in the case was convicted under section 61‡ of the Stamp Act for signing an unstamped receipt and fined Re. 1 by the District Magistrate, who as District Judge, had impounded the document in a civil case and forwarded it to himself as Collector, and as Collector, had ordered the accused to be tried by himself as District Magistrate.

The District Magistrate was called upon for report concerning the procedure followed with reference to the principles contained in the Code of Criminal Procedure, sections 487 and 555;* and, after considering his report and hearing the Government Prosecutor who argued the several questions raised, it was

Held—that the man must not at the same time be accuser and judge; he must not be a party or be personally interested, and he must not have prejudged the case before him, but

that as the District Magistrate had acted executively throughout without necessarily forming any opinion on the merits, and as accused had not been substantially prejudged, it was unnecessary to interfere in revision this instance.

At the same time it was manifestly desirable that, when it could be avoided without inconvenience, the trial of an offence should not be had before a Judge or Magistrate who, in another capacity, had had to do with the institution of the prosecution, and it was the general practice to make arrangements accordingly. No good purpose could be served by unnecessarily allowing such a complication of functions as had occurred in the present case.

References.

I.L.R., 14 All., 354.

„ 15 All., 192.

„ 6 Bom., 479.

„ 3 Cal., 622.

„ 16 Cal., 766.

Financial Department Circular No. 22 of 1892.

THIS was a prosecution under section 61‡ of the Stamp Act for executing an instrument, namely, a receipt chargeable with duty without the same being duly stamped.

The accused was convicted and fined one rupee by the Magistrate, who acted the part of three single gentlemen rolled into one. As District Judge this officer impounded the document in a civil case and forwarded it to himself as Collector; as Collector he ordered the accused to be tried by the District Magistrate, himself again, and as District Magistrate he tried, convicted, and sentenced the accused.

[* Section 556 of the Code of Criminal Procedure, 1898.]

[† Section 190 of the Code of Criminal Procedure, 1898.]

[‡ Section 62 of the Stamp Act, 1889.]

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The only excuse the accused had to offer was that he did not understand the law, and he does not appear to have been prejudiced by this lightning-chameleon transformation performance so far as punishment was concerned.

It is not equally certain, however, that it would not have been better for accused to have been tried by another Court as regards the conviction, for it is not quite clear what the nature of the document really is. It mentions certain quantities of precious stones and their value, Rs. 180; but whether it was the money or the stones that accused acknowledged to have received is left doubtful. If the latter were meant, it would be necessary to show that there was a debt, for the definition of "receipt" in clause (17) of section 3* of the Stamp Act says "whereby any other moveable property is acknowledged to have been received in satisfaction of a debt." This point was not, however, raised in defence.

The District Magistrate was called upon for report concerning the correctness of the procedure followed with reference to the principles contained in the Code of the Criminal Procedure, sections 487 and 555,† and he has very sensibly discussed the matter in the report below.

He says :

"The point raised is whether a Collector who has sanctioned a prosecution under the Stamp Act can himself try the case as District Magistrate. It is suggested that he is debarred from doing so by the principles contained in sections 487 and 555† of the Criminal Procedure Code. Section 487 refers specially to the offences mentioned in section 195. Those offences are briefly—

- (i) contempts of the lawful authority of public servants;
- (ii) cases in which evidence, verbal or documentary, appears to a public servant before whom it comes to be false.

The principle which underlies the first group appears to be that the public servant is personally interested in a case concerning the contempt of his authority, and in the second, that the public servant, having formed an opinion as to the falsity of the evidence, is not competent to try the question of that falsity.

Section 555† applies the first principle to all cases.

Section 69‡ of the Stamp Act requires the sanction of the Collector to the institution of any prosecution under the Act, and implies a certain amount of discretion on his part. Where that discretion can be exercised and involves the formation of an opinion as to whether a breach of the stamp law has been committed with an intention of evading payment of the proper stamp duty, as required in sections 40 and 50, the second principle would, I think, apply, and the offender would be entitled to a second opinion if the application of the principal were extended to such cases. In this case, however, no such opinion was formed and no discretion was exerciseable, it having been ruled that a prosecution is compulsory in all cases in which a document chargeable with a stamp, duty of one anna is not duly stamped.—*vide* Financial Department Circular No. 22 of 1892. The second principle, therefore, does not seem to apply.

As regards the first principle, it does not seem to me that the Collector is more personally interested in a prosecution under the Stamp Act than in one under the Excise or Opium Act, or than a Municipal Commissioner in one under a Municipal Act. It could no doubt be held that in all such cases most of the Magistrates

[* Section 2 (23) of the Stamp Act, 1899.]

[† Section 566 of the Code of Criminal Procedure, 1898.]

[‡ Section 70 of the Stamp Act, 1899.]

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in Burma are personally interested; but the carrying of these principles to their extreme limit would result in grave administrative difficulties and impose great inconvenience on parties and witnesses.

In this case I impounded the document as District Judge, and, as a prosecution was compulsory, I sanctioned it as Collector and tried the case as District Magistrate, in order to avoid delay and inconvenience to the offender.

The measurement of punishment in such cases is a point in which great diversity of practice exists and on which it would be highly satisfactory to have a definite ruling. In cases of intentional evasion, the circumstances of each case must of course be considered, but in ordinary cases of negligent or ignorant omission, which are met under the provisions of sections 34, 37 and 50,* where higher duties are chargeable with minimum penalty of Rs. 5 at a scale of ten times the duty, it would be well to lay down whether the minimum of Rs. 5 should extend or whether the Courts should be guided by the scale of ten times the deficient duty.

On the question of jurisdiction, I should also like a ruling as to whether a Judge who has levied duty and penalty under section 34† and has recorded an opinion that the offence was committed with an intention of evading payment of the proper duty, is competent to try the offender if his prosecution is sanctioned by the Collector. On the second principle as I have set it out above, he would be debarred, and in out-stations a ruling to this effect would considerably increase the inconvenience of a prosecution under the Stamp Act on the offender. I am of opinion that the provisions of section 487, Criminal Procedure Code, should be confined to the offences detailed in section 155, and that the provisions of section 555‡ should be confined to such cases as may occur, in which the personal interest of the Judge or Magistrate is of such a nature that it is likely to affect his partiality in trying the offender.

The Government Prosecutor has since been instructed to appear, and has argued the several questions raised.

In the first place it may be observed that the District Magistrate is apparently mistaken in his notion that he had no discretion in the matter, and that a prosecution was compulsory because the unstamped instrument was chargeable with a duty of one anna.

Section 69§ of the Stamp Act expressly forbids a prosecution in respect of *any* offence punishable under the Act without the sanction of the Collector or some other officer authorized in that behalf. There seems to be nothing in the Act to limit or fetter the Collector's discretion, and nothing outside the Act could have that effect. Rules may be made under section 56|| to carry out generally the purposes of the Act, but they must be consistent with the Act. Supposing, however, that a restrictive rule controlling the Collector's discretion could be made, as perhaps it could, it does not appear that any such rule has in fact been made.

The District Magistrate has cited Financial Department Circular No. 22 of 1892, dated the 11th August, issued by the Local Government, as his authority, but that circular merely circulates for information and guidance an opinion of the Government Advocate, in which he says:

"I think the intention of the Legislature was that a prosecution under section 61¶

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[* Sections 35, 40 and 61 of the Stamp Act, 1899.]

[† Section 35 of the Stamp Act, 1899.]

[‡ Section 556 Code of Criminal Procedure, 1898.]

[§ Section 70 of the Stamp Act, 1899.]

[|| Section 75 of the Stamp Act, 1899.]

[¶ Section 62 of the Stamp Act, 1899.]

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NGA AUNG GYL. duly stamped."

It is probably expedient that breaches of the law in this particular should ordinarily be prosecuted and punished, but the Legislature has plainly left the decision in the matter to the Collector in section 69* of the Stamp Act.

On the other hand, the Collector, in ordering the prosecution, was manifestly acting merely in the discharge of his ordinary executive duties, and was not exercising the *quasi*-judicial functions imposed upon him by section 40† of the Act in the case of instruments, in respect of which a penalty may be levied under the provisions of Chapter IV, instruments chargeable with a duty of one anna being excluded from those provisions. The learned Government Prosecutor has argued, accordingly, that the Collector was not precluded from trying this case himself. If a Collector ordered a prosecution under section 40,‡ he ought not apparently to try the case himself, because he would have formed an opinion as to the intention of the accused, and, although intention is not an ingredient in an offence under section 61,‡ it would be an element in estimating the measure of punishment.

A Magistrate is not debarred from trying a case under the Opium Act by reason merely of his being in charge of the Excise and opium administration of the district, though he must not be himself the officer who institutes and conducts the prosecution.§

A Judge may sanction a prosecution as District Judge in a civil proceeding and try the case as Sessions Judge, but he cannot do so when he has directed the prosecution in his capacity of Sessions Judge.||

The rules on the subject are laid down in sections 555,¶ 487 and 191 (c)** of the Code of Criminal Procedure.

Section 487 does not directly apply in the present instance, because it refers only to the offences specified in section 195 of the Code, but the principle which underlies the rule is of general force, namely, that a man ought not at the same time to be accuser and judge.

Section 555¶ that says the judge must not be a party or personally interested in the case which he tries, unless the permission of a Superior Court is given.

Section 191** gives the accused a right of challenge when the Magistrate takes cognizance of an offence not upon complaint or upon a police report, but "(c) upon information received from any person

[* Section 70 of the Stamp Act, 1899.]

[† Section 43 of the Stamp Act, 1899.]

[‡ Section 62 of the Stamp Act, 1899.]

[§ I.L.R., 15 All., 192, and 3 Cal., 622.]

[|| I.L.R., 6 Bom., 479, 16 Cal., 766, and 14 All., 354.]

[¶ Section 556 of the Code of Criminal Procedure, 1898.]

[** Section 190, Code of Criminal Procedure, 1898.]

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other than a police officer, or upon his own knowledge or suspicion that such offence has been committed."

Here the District Magistrate, as he was not acting under clause (a) or clause (b) of section 191,* must have taken cognizance under clause (c), and consequently the accused was entitled to require that the case should be transferred to another Magistrate. And it has been laid down as the correct practice of the Courts that the attention of ignorant accused persons should be drawn to this provision of law in their favour. The effect of this provision is to make the action of a Magistrate under section 191 (c)* voidable at the option of an accused person who challenges his jurisdiction at the commencement of the proceedings in the same way as he is allowed to challenge the jurisdiction of a juryman under section 277.

On the other hand, the law permits a Magistrate, subject to such safeguard, to try an offence notwithstanding that he may have initiated the prosecution of his own motion.

The law does not attempt to lay down an absolutely hard-and-fast rule, but leave the circumstances of each case to be dealt with as they arise, and in the infinite variety of human affairs no other course would be likely to be safe.

It would be inexpedient, and might on occasion be gravely embarrassing, to fetter judicial administration with too many restrictions, and all that is necessary is to provide against a miscarriage of justice through prejudice to an accused person by laying down general principles which can be applied as a remedy when required to individual circumstances.

At the same time, it is manifestly desirable that, when it can be avoided without inconvenience, the trial of an offence should not be had before a Judge or Magistrate who, in another capacity, has had to do with the institution of the prosecution, and it is the general practice to make arrangements accordingly. No good purpose can be served by unnecessarily allowing such a complication of functions as has occurred in the present instance.

In the present case the accused does not seem to have suffered prejudice except it may have been in regard to the view taken as to the nature of the document, and no question was ever raised on this point. If accused were re-tried and convicted, the punishment would have to be substantial instead of nominal, and the case is so trifling that it is not worth while interfering on the chance that a mistake may have been made touching the character of the instrument.

The District Magistrate has asked—

"Whether a Judge, who has levied duly any penalty under section 34† and has recorded an opinion that the offence was committed with an intention of evading payment of the proper duty is competent to try the offender if his prosecution is sanctioned by the Collector.

[* Section 190, Code of Criminal Procedure, 1898.]

[† Section 35 of the Stamp Act, 1899.]

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But there appears to be no reason why any such question should ever arise, since the section does not require a Court to record any opinion whatever in the matter, all that the Court has to do being to settle whether the document under consideration is chargeable with duty or not, and whether it is properly stamped.

The District Magistrate also seeks guidance as to the measure of punishment.

It is clearly impossible to lay down a definite rule on the subject. Every case must be treated on its own merits. The law allows a maximum penalty of Rs. 500 for an offence under section 61* of the Stamp Act, and the full amount of fine would not be too much in some cases.

Besides intention, the Magistrate would naturally take into consideration the importance of the transaction, the character of the instrument, the interests involved, the description of evasion, and the facility or difficulty with which it could be practised, the prevalence of the particular kind of offence, and so forth, in determining the extent of punishment. The learned Government Prosecutor points out, with respect to receipts, that it is hardly credible that any one can now be ignorant of the requirement of a stamp on them, and he is no doubt quite right.

The obligation is very easily evaded, and, when there is no fair excuse for failure to comply with the law, substantial punishment is called for. The same remark applies to any case of really wilful disobedience of the Stamp Law.

On the other hand, where a breach of the law is owing to pure misunderstanding, mistake, inadvertence or such like, much leniency should be shown. But a judicious Collector would of course take care, so far as he could, that very few cases of that sort should be brought before the Criminal Courts.

[*Section 62 of the Stamp Act, 1899.]

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Before H. Thirkell White, Esq., C.I.E.

RAM RICH PAL v. QUEEN-EMPRESS.

*Mr. F. C. Chatterjee—*for applicant.

Circumstances under which a Magistrate is disqualified from trying a case by reason of previous official concern with it.

*Criminal Revision
No. 894 of
1899.
September,
25th*

In this case the Deputy Commissioner, as Collector, sanctioned the prosecution of the accused and forwarded the papers to himself as District Magistrate for the necessary orders as regards the prosecution.

Held—That as the Magistrate in his capacity of Collector took an active part in initiating the prosecution, he was disqualified from trying the case under section 556, Code of Criminal Procedure.

Reference—

I. L. R., 18 Bom., 442.

The case is one in which the District Magistrate might, with advantage, have instructed the Government Prosecutor to appear in support of the conviction. Some points of importance are involved.

The first point taken by the applicant is that as the Deputy Commissioner sanctioned the prosecution as Collector, he should not have tried the case as District Magistrate. This point has been argued on general principles and by reference to decisions under former Codes of Criminal Procedure. It must be decided in the light of section 556 of the present Code. Under that section no Judge or Magistrate may try a case to which he is a party or in which he is personally interested, but the disqualification is not caused merely because he is concerned in the case in a public capacity. The meaning of this part of the section is that the mere fact that a Magistrate is concerned in a case in a public capacity does not disqualify him from trying the case. But if he has actively concerned himself in the case, he may be disqualified. Thus, the mere fact that the District Magistrate is also Collector in the Excise Department would not disqualify him from trying an Excise case in which he had taken no part in directing or initiating the prosecution. But if, as Collector, he has directed an Excise prosecution, he is disqualified from trying the case as a Magistrate. This is the only possible interpretation, I think, of the section and its illustration, and it is a construction which involves no difficulty.*

In the present case the Deputy Commissioner, as Collector, sanctioned the prosecution of the accused and forwarded the papers to himself as District Magistrate for the necessary orders as regards the prosecution. In so doing I think that he took an active part in initiating the prosecution, if he did not actually direct it, and that he was therefore disqualified from trying the case.

* Cf. I. L. R., 18 Bom., 442.

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It has further been urged that, even if the District Magistrate were competent to try the case, he must be considered to have taken cognizance of it under section 190, sub-section (1), clause (c), of the Code of Criminal Procedure, and that the accused should therefore, under section 191, have been given an opportunity of moving for the transfer of the case to another Magistrate. It is not necessary for me to decide this point, as the conviction must be set aside for the reasons already stated. But it seems likely that the contention is correct.

The case has also been argued on the merits; but as there has been no argument on the other side, and as decision of the case on the merits is not necessary, I prefer to express no opinion on them.

For the reason that the Magistrate was disqualified from trying the case under section 556, Code of Criminal Procedure, I set aside the conviction and sentence in the case of Ram Rich Pal and direct that the fine which has been paid be refunded to him.

The proceedings should have been held under the Act of 1879. The Stamp Act, 1899, did not come into force till 1st July 1899.

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KING-EMPEROR v. NGA KYA.

Mr. H. M. Lütter, Government Prosecutor,—for the Crown.

Circumstances under which a Magistrate is debarred under section 556, Criminal Procedure Code, from trying an offence.

*Criminal Revision
No. 712 of
1901.
October
15th.*

Accused Nga Kyaw was tried by a second class Magistrate under section 170, Indian Penal Code, and sentenced to one month's rigorous imprisonment. The District Magistrate, in the exercise of the revisional jurisdiction conferred upon him by section XII, Upper Burma Criminal Justice Regulation, enhanced the sentence to six months. Before doing so he ordered notice to issue to the accused as required by proviso (i) calling upon him to show cause against enhancement. At the same time he directed a warrant to be issued for the accused's arrest. After some trouble accused was found and arrested and released on furnishing bail for his appearance. On the day fixed he failed to appear. On this the bail was forfeited and proceedings taken to secure his attendance. The District Magistrate then tried him under section 174, Indian Penal Code, for failing to appear in accordance with his bail-bond. This case the District Magistrate took cognizance of under section 190 (1) (c), Criminal Procedure Code, and the accused waived his right to be tried by another Magistrate. The questions that arose were (1) whether the order directing the issue of a warrant of arrest was legal, and (2) whether the District Magistrate was debarred by section 556, Criminal Procedure Code, from trying the case under section 174, Indian Penal Code.

Held—That it was very doubtful if the order for the issue of a warrant of arrest in the present case was legal, and, if not the accused could not be rightly convicted under section 174, Indian Penal Code.

Held also—That the District Magistrate was the public servant whose lawful authority the accused was charged with contemning, and in the circumstances he was disqualified by section 556, Criminal Procedure Code, from trying the case.

Reference—

1 Upper Burma Rulings, 1897—1901, page 133.

ACCUSED Nga Kyaw was tried by a Second class Magistrate under section 170, Indian Penal Code, and sentenced to one month's rigorous imprisonment.

The District Magistrate, in the exercise of the revisional jurisdiction conferred upon him by section XII, Upper Burma Criminal Justice Regulation, enhanced the sentence to six months. Before doing so he ordered notice to issue to the accused as required by the proviso to clause (1), calling upon him to show cause against enhancement. At the same time he directed a warrant to be issued for the accused's arrest. After some trouble accused was found and arrested and released on furnishing bail for his appearance. On the day fixed he failed to appear. On this the bail was forfeited and proceedings taken to secure his attendance. The District Magistrate then tried him under section 174, Indian Penal Code, for failing to appear in accordance with his bail bond.

This case the District Magistrate took cognizance of under section 190 (1) (c), Criminal Procedure Code, and the accused waived his right to be tried by another Magistrate.

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The questions that arise are (1) whether the order directing that issue of a warrant of arrest was legal, and (2) whether the District Magistrate was debarred by section 556, Criminal Procedure Code, from trying the case under section 174, Indian Penal Code.

The procedure to be observed in a case when a District Magistrate orders notice to be issued under section XII, Criminal Justice Regulation, calling upon an accused person to show cause against enhancement, is not laid down.

The direction that no order shall be made to the prejudice of the accused unless he has had an opportunity of showing cause against it appears to apply to final orders, but it is arguable that it cover also an order for the accused's arrest pending the final order.

Section 427, Criminal Procedure Code, empowers a High Court to which an appeal against an order of acquittal has been preferred to issue a warrant for the arrest of the accused pending the appeal.

This is the only analogy to be found for the procedure adopted by the District Magistrate.

I think it is very doubtful if the order for the issue of a warrant of arrest in the present case was legal, and, if not, the learned Government Prosecutor admits that the accused could not be rightly convicted under section 174, Indian Penal Code.

It is unnecessary to decide the point, because on the second ground the conviction cannot be sustained.

The meaning of section 556, Criminal Procedure Code, has been very clearly explained in *Ram Rich Pal v. Queen-Empress*.*

It was there held that a Deputy Commissioner who, as Collector, sanctioned the prosecution of an accused person for an offence under the Excise Act, actively concerned himself in initiating the prosecution, and was therefore disqualified by section 556, Criminal Procedure Code, from trying the case as a Magistrate.

In the present case the District Magistrate similarly initiated the prosecution, and he was also in the position of a party, since he was the public servant (and Court of Justice) before whom the accused, according to the charge, "intentionally omitted to attend" when legally bound to do so. In other words he was the public servant whose lawful authority the accused was charged with contemning.

In these circumstances, I am of opinion that the District Magistrate was disqualified by section 556, Criminal Procedure Code, from trying the case.

I therefore set aside the conviction and sentence passed under section 174, Indian Penal Code, and direct that, so far as this case is concerned, the accused be released.

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QUEEN-EMPRESS *v.* NGA SAN CHEIN.

Criminal Procedure, 562—Power of Courts to release first offenders in trivial cases—Procedure.

*Criminal Revision
No. 839 of
1898.
September
24th.*

In this case the accused, who was 40 years of age, was given the benefit of section 562, Code of Criminal Procedure, as the value of the property stolen was insignificant and this was his first offence. The Magistrate passed an order requiring the accused to execute a bond to be of good behaviour for six months, or in default to suffer twenty stripes.

Held—that the Court should not pass an order for release on probation and at the same time a specific sentence in default. The proper procedure is for the Court to pass the order for release on probation; if the offender does not accept the terms, then sentence should be passed.

The accused was 40 years age. The Magistrate gave him the benefit of section 562, Criminal Procedure Code, because the value of the stolen property was insignificant and this was his first offence. He passed an order requiring the accused to execute a bond to be of good behaviour for six months, or in default to suffer twenty stripes.

On this order it is to be remarked that section 562, Criminal Procedure Code, does not seem to give a general power to release first offenders in trivial cases. Regard must be had to the youth, character, and antecedents of the offender, to the trivial nature of the offence, and to any extenuating circumstances under which it was committed. Apparently only comparatively youthful offenders can be dealt with under this section, though it is not restricted to those who are technically juvenile offenders.

I think it is clear that it is not intended that a Court should pass an order for release on probation and at the same time pass a specific sentence in default. The proper procedure is for the Court to pass the order for release on probation; if the offender does not accept the terms, then sentence should be passed.

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Criminal Revision
No. 215 of
1900.
March
23rd.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS *v.* AH WUN.

Mr. H. N. Hirjee—for respondent.

Criminal breach of trust—Release of accused on security for good conduct.

The accused was convicted of criminal breach of trust with regard to a pony under section 406, Indian Penal Code. He was released on probation of good conduct under section 562, Code of Criminal Procedure.

Held—that a person convicted of criminal breach of trust, which is not one of the offences specified in section 562, Code of Criminal Procedure, and which is punishable with more than two years' imprisonment, cannot be released on security for good conduct.

It is clear that, on the face of section 562, Code of Criminal Procedure, a person convicted of criminal breach of trust, which is not one of the offences specified in the section and which is punishable with more than two years' imprisonment, cannot be released on probation. It is suggested that "dishonest misappropriation" is used in the section as a general term and that it includes "criminal breach of trust." I do not think that this view can be accepted. In the case of theft, the legislature did not think it sufficient to use "theft" as a general term. It was considered necessary to specify also "theft in a building." Yet it seems more natural to hold that "theft" would include offences punishable under section 380 as well as under section 379, Indian Penal Code, than to hold that "dishonest misappropriation" covers the more complex offence of criminal breach of trust. I am therefore of opinion that the order of the Subdivisional Magistrate releasing Ah Wun on probation could not properly be passed. It is accordingly set aside and the Magistrate is directed to pass sentence according to law. The case, it may be remarked, is one in which compensation might reasonably be awarded to the complainant. The accused is remanded to custody and should be produced before the Magistrate without delay.

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Before G. W. Shaw, Esq.

KING-EMPEROR v. BABUDIN.

*Criminal Revision
No. 454 of
1901.
July 25th.*

Lurking house-trespass by night—Section 456, Indian Penal Code—accused 35 years of age erroneously convicted under section 453, Indian Penal Code—Order under section 562, Criminal Procedure Code, in the circumstances bad.

The accused entered the house of one Ye Langari after sunset without his knowledge and hid himself there and when surprised by Ye Langari he blew out the light and ran away. The Magistrate apparently thought that accused's intention was to make love to Ye Langari's wife, but there was nothing to support the suggestion. The Magistrate found accused guilty under section 453, Indian Penal Code, and ordered him to execute a bond in Rs. 50, with two securities, for one year, under section 562, Criminal Procedure Code.

Held— that the order under section 562, Criminal Procedure Code, was bad for two reasons, namely:—

- (1) the accused was 35 years of age and was not a person whose youth could be taken into consideration ;
- (2) the offence disclosed was that punishable under section 456, Indian Penal Code, which was punishable with more than two years' imprisonment.

*Pointed out—*that the Magistrate should not have convicted under section 453 when the offence punishable by section 456, Indian Penal Code, was established.

There is nothing to show what the accused's purpose was in committing lurking house trespass by night (section 456, Indian Penal Code), but it is clear that he did commit that offence. After sunset he entered the house of Ye Langari without his knowledge and hid himself there, and when surprised by Ye Langari he blew out the light and ran away.

The Subdivisional Magistrate should not have convicted under section 453 when the offence punishable by section 456, Indian Penal Code, was established.

The order under section 562, Criminal Procedure Code, was bad for two reasons ; (1) the accused is 35 years of age, that is to say, he is not a person whose youth can be taken into consideration, and (2) as above noted the offence disclosed was that punishable under section 456 which is punishable with more than two years' imprisonment.

The Magistrate apparently thought that accused's intention was to make love to the dhobi's wife, but there is nothing to support this suggestion except that accused is a well-to-do-shop-keeper of respectable character which does not seem to be a good reason for the opinion.

The learned Sessions Judge thinks that accused ought to have been acquitted, but I do not see any ground for thinking that the case was a false one.

Even if the dhobi's wife was the attraction and even if no legal marriage should be found to exist between the dhobi and the woman, and there is nothing to show that this was the case, the dhobi is still

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entitled to be protected against entry into his house for the purpose of insulting or annoying him by seducing the woman who was his wife or was living with him as such.

The accused has been called upon to show cause against an alteration of the section under which his conviction stands from 453 to 456 and the substitution of a sentence of imprisonment for the Magistrate's order under section 562, Criminal Procedure Code.

He does so by petition, but fails to make any representation that is new or sufficient.

I alter the conviction to one under section 456, Indian Penal Code, and set aside the order under section 562, Criminal Procedure Code, and direct that accused undergo one month's rigorous imprisonment.

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SECTIONS 30, 31. *See also* page 330.

SECTION 106. *See also* page 9.

SECTIONS 110, 123. *See also* page 375.

SECTION 117. *See also* page 228.

SECTION 154. *See also* page 156.

SECTION 190 (1) (c), 191. *See also* page 224.

SECTION 195. *See also* page 279.

SECTIONS 494, 528. *See also* page 365.

SECTION 496. *See also* page 291.

SECTION 556. *See also* page 8.

Evidence.

Evidence.

Criminal Appeal
No. 89 of
1899.
August
29th.

Before H. Thirkell White, Esq., C.I.E.

NGA TAIK PYU *v.* QUEEN-EMPRESS.

Evidence of identification—Remarks on—

The accused was convicted under section 392, Indian Penal Code.

Remarked that evidence of identification is not necessarily untrue because not given immediately after the occurrence. But when such evidence is withheld for a time, the Court should endeavour to obtain from the witnesses an explanation of the reason.

The two appellants have been sentenced to rigorous imprisonment, each for five years, under section 392, Indian Penal Code.

Against both the appellants there is evidence directly identifying them as being among the robbers. The value of the evidence of identification is somewhat impaired by the fact that it was not given till sometime after the commission of the robbery. I am quite aware that people who have been robbed are often frightened and reluctant to speak freely and give all the information within their knowledge at first. Allowance must be made for this, and I am certainly not prepared to say that no evidence of identification should be received unless the witnesses at once declare themselves to have recognized the person concerned. But it is a point to be considered in each case and it would have been well if the witnesses had been examined on it in this case.

As regards the appellant Taik Pyu, the sole evidence is that of identification. The chief evidence is that of one Tun Bon. I find that Tun Bon made no mention of Taik Pyu till the 25th April 1899. He then said that he recognized his voice. He does not seem to have said anything about the personal recognition of Taik Pyu till some days later. I cannot but think that this throws great doubt on the identification of the appellant. If the witness had merely delayed a few days and then told the story which he told in Court, I should not be disposed to say that the delay was not susceptible of explanation.

But if Tun Bon really recognized Taik Pyu it is difficult to see why he should not have said so when he first spoke of recognizing his voice. The case against Taik Pyu rests entirely on the alleged identification. I am constrained to say that it appears to me to be of very doubtful value and that it would be unsafe to maintain the conviction on the strength of it.

Against Nyan Gywe there is evidence, which the District Magistrate has believed, that part of the stolen property was found in his house. There is also the evidence of his identification by the house owner, San Gywe. This does not seem to be open to as much objection as the evidence against Taik Pyu, though in itself I should not regard it as sufficient. But it is corroborated by the finding of the stolen pro-

Evidence.

perty, of the possession of which no satisfactory explanation has been given. I think the conviction of Nyan Gywè may be sustained. NGA TAIK PYU
v.

The conviction and sentence in the case of the appellant Taik Pyu QUEEN-EMPRESS.
are reversed and it is directed that he be acquitted and released.

The appeal of Nyan Gywè is dismissed.

Evidence—14, 15.

Evidence—14, 15.

Criminal Appeal
No. 143 of
1900.
December
10th.

Before H. Thirkell White, Esq., C.I.E.

NGA SWE HMAN v. QUEEN-EMPRESS.

Mr. H. M. Lütter, Government Prosecutor—for the Crown.

Evidence of previous convictions when relevant as regards the guilt of an accused.

The appellant was convicted of the theft of eight buffaloes and having been previously convicted of theft was sentenced to transportation for 10 years. In deciding the question of the guilt or innocence of the appellant the Sessions Judge took into consideration the fact that he had two previous convictions for theft. The Sessions Judge sentenced the accused to imprisonment and then commuted the imprisonment to transportation.

Held—that in a prosecution for theft it cannot be assumed as of course that a previous conviction for the same offence is relevant in establishing the guilt of the accused. In order that it may be relevant under section 15 of the Evidence Act, it must be strictly shown that that section applies.

References:—

I L. R., 6, Cal., 655, cited in Messrs. Amir Ali and Woodroffe's Law of Evidence, page 98.

Messrs. Amir Ali and Woodroffe's Law of Evidence, page 107.

THE appellant, Nga Hman, has been convicted of the theft of eight buffaloes, and, having been previously convicted of theft, has been sentenced to transportation for 10 years.

There is no reason to doubt that eight buffaloes stolen on 19th May 1900 were in possession of Nga Hman, and his associates as early as 5th June 1900. I agree with the learned Sessions Judge that the possession is sufficiently recent to justify the presumption that the appellant stole them. The appellant has entirely failed to rebut this presumption. He has given inconsistent accounts of the manner in which he came into possession of the buffaloes; and the witnesses called by him in support of one of these accounts deny all knowledge of the transaction. In these circumstances I have no doubt that the appellant has been rightly convicted.

In deciding the question of the guilt or innocence of the appellant, the learned Sessions Judge has taken into consideration the fact that he had two previous convictions for theft. This is justified by reference to section 15 of the Evidence Act. It would have been interesting if the Sessions Judge's reasons for considering this evidence admissible had been developed in detail. I have, however, had the advantage of hearing the learned Government Prosecutor who has been instructed to argue the point in this appeal. Section 15 of the Evidence Act for the purpose of this case may be cited as follows:—

“When there is a question whether an act was * * * done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.”

The illustrations to this section indicate the classes of cases to which it applies. In the present case it does not appear that there

Evidence—14, 15.

is any question whether an act was done with a particular intention. If it is proved that Nga Hman moved the cattle in this case from the possession of the owners, it is not alleged that he did so without any dishonest intention. A case may easily be imagined in which the question of intention in connection with a charge of theft of cattle would arise. If, for instance, A were found in the act of taking B's cattle out of B's pen, and if A pleaded that he had no intention of stealing the cattle but was merely taking them out for a walk, the fact that A had been previously convicted of thefts committed under similar circumstances would probably be relevant under section 15. Again, it is not the mere fact that on a previous occasion the accused has committed a similar act which is made relevant by this section. What is relevant is the act that the act formed part of a series of similar occurrences in which the accused was concerned. It may be conceded that explanation (2) of section 14 applies to section 15 also. But there is nothing to show what were the circumstances of the two previous thefts committed by the accused or that they with the present alleged theft constituted a series of similar occurrences. The scope of section 14 of the Evidence Act was stated by Garth, C. J., in the case of *M. J. Vyepoory Moodelier* * in the following words:—

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v.
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"Section 14 seems to me to apply to that class of cases which is discussed in Taylor on Evidence, 6th Edition, sections 318-322; that is to say, cases where a particular act is more or less criminal or culpable, according to the state of mind or feeling of the person who does it; as for instance, in actions of slander or false imprisonment, or malicious prosecution, where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff; or again, in a charge of uttering coin, evidence is admissible to show that the prisoner knew the coin to be counterfeit, because he had other similar coin in his possession, or had passed such coin before or after the particular occasion which formed the subject of the charge. The illustrations to section 14, as well as the authorities cited in Taylor, show with sufficient clearness the sort of cases in which this evidence is receivable. But I think we must be very careful not to extend the operation of the section to other cases, where the question of guilt or innocence depends upon *actual facts, and not upon the state of a man's mind or feeling*. We have no right to prove that a man committed theft or any other crime on one occasion by showing that he committed similar crimes on other occasions."

These remarks apply to section 15 of the Act which, as remarked by Messrs. Amir Ali and Woodroffe† is on application of the rule laid down in the preceding section. They were made before the amendment of these section by Act III of 1891. But they seem to apply to the section as they now stand. No authority has been cited in which, in a case like the present, previous conviction of the accused for theft has been considered relevant. Indeed the Government Prosecutor admits that the reported cases are against him. Although, therefore, I agree with the learned Sessions Judge, thinking that the

* I. L. R., 6 Cal., 655, cited in Messrs. Amir Ali and Woodroffe's Law of Evidence, page 98.

† Law of Evidence, page 107.

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appellant's guilt is legally established I am bound to express dissent from the view that the previous conviction are relevant. This expression of opinion applies only to the facts of the present case or to facts undistinguishable therefrom. It is to the effect that in a prosecution for theft it cannot be assumed as of course that a previous conviction for the same offence is relevant ; in order that it may be relevant, under section 15 of the Evidence Act, it must be strictly shown that that section applies.

I observe that the appellant admitted only one previous conviction. The certificate filed in Form No. 152* is not a certificate of the kind contemplated by section 511, Code of Criminal Procedure. The form used in Upper Burma under that section is at present numbered No. 129† and was prescribed by Circular No. 24 of 1897. Form No. 152* is a form to be attached to warrants in the case of previously convicted prisoners.

I observe that the learned Sessions Judge sentenced Nga Hman to imprisonment and then commuted the imprisonment to transportation. There is no warrant in the Penal Code or Code of Criminal Procedure for this course. Section 59 of the Penal Code says that in certain circumstances a Court instead of a warding sentence of imprisonment may sentence the offender to transportation. The proper course is no doubt for the Court to pass a sentence of transportation at once, citing section 59 of the Penal Code as well as the section under which the conviction is had.

In this case I am of opinion that the conviction is correct and that the sentence is appropriate. The appeal of Nga Hman is, therefore, dismissed.

[* Now number U. B. ^{Judicial}_{Criminal} 88.]

[† Now number U. B. ^{Judicial}_{Criminal} 87.]

Evidence—24.

Evidence—24.

Before H. Adamson, Esq.

S. N. MUKERJEE *v.* QUEEN-EMPRESS.

Evidence, 24—Confession caused by inducement, threat or promise.

Criminal Appeal
No. 70,
1899.
June
5th.

The accused, who was a Postmaster, was convicted under section 409, Indian Penal Code, and sentenced to three years' rigorous imprisonment. He made a confession before the Subdivisional Magistrate. Before he confessed the Subdivisional Magistrate said to him. "It is no use your trying to get out of it. You were seen with the pair of shoes." The question to be considered, was, whether under section 24, Evidence Act, this remark was sufficient to invalidate the confession.

Held—That, even admitting that these words may be construed as a threat, the threat to come under section 24 of the Evidence Act must be sufficient to give the accused grounds for supposing that, by making the confession, he would gain an advantage. Though the language used, interpreting it in the light most favourable to the accused, might be considered sufficient to overcome the mind of an uneducated and inexperienced boy, yet it was not sufficient to overcome the mind of a man of the age, experience, education, and position of the accused, so as to induce him to make a confession, and that therefore it did not invalidate the confession.

References—

Ameer Ali and Woodroffe's Law of Evidence. *R. v. Mills*, 6 C. and P., 146.

The appeals of Bagawandin and S. N. Mukerjee are heard together. The latter was the Postmaster and the former the postman of the Pinlebu Post office, which was burned down on 1st April last.

The charges against Bagawandin are—

- (1) That, being present, he abetted the criminal breach of trust of a public servant with regard to a value payable parcel.
- (2) That he dishonestly received stolen property (Rs. 200 or thereabouts), knowing it to have been stolen.
- (3) That he committed mischief by fire in burning down the Pinlebu Post office.

As regards the first charge, accused's statement is sufficient to render his guilt perfectly clear. He states that at the instigation of the superior officer, the Postmaster, he wrote to Mohamed Shafi, Cawnpore, in the name of Ram Kishore, contractor, and requested that two watches, three pairs of shoes, and a saddle should be sent by value payable parcel; that the parcel arrived at the Pinlebu Post Office on the day before the fire; that while he was eating his food the Postmaster brought him the two watches and the shoes and gave them to him as a present, that the Postmaster agreed to buy the silver watch from him for Rs. 20, that he lent it to the Postmaster to wear at a *pwe*; that the Post office was burned down that night, and that next day, on the arrival of the Subdivisional Police Officer, he at the instigation

Evidence—24.

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of the Postmaster gave the watches and other things which the Postmaster told him had been in the parcel to Ugar Singh to take away. His statement is corroborated by the fact that these articles were actually found in Ugar Singh's possession, 11 miles from Pinlebu, where he had taken them in his cart. This statement is inconsistent with any other explanation than that accused knew that criminal breach of trust had been committed with regard to the value payable parcel, and that he abetted it. His guilt on this charge is clearly established.

As regards the second charge, accused Bagawandin pleaded guilty. It is proved that he spent a large amount of money in the bazaar immediately after the fire, and that he exhumed, and gave to the Subdivisional Police Officer a sum of Rs. 135. He states that on the day after the fire the Postmaster gave him Rs. 175 to dispose of. He spent one bundle of money in the bazaar, he had other four bundles of money, of which he threw two at the Postmaster, who was drunk and abused him, and the other two he buried in the ground and subsequently dug up and gave to the Police Officer. Bagawandin's guilt under this charge is also perfectly clear.

As regards the third charge, it is shown that Bagawandin was left in charge of the Post Office on the night on which it was burned. Just before the fire he was seen by Maung Se running from the Post office to his godown, and immediately afterwards the fire broke out. His guilty conduct with regard to the value payable parcel, and the fact that he was next day in possession of large amounts of money that could have been stolen from nowhere but the Post office show that his interest lay in having the building burned. Both opportunity and motive are proved, and he was actually seen running from the building just as it went on fire. On this evidence I think that there can be no reasonable doubt that he burned down the Post office, and on this charge also his conviction is undoubtedly correct.

Against the appellant S. N. Mukerjee there is only one charge, namely, that he committed criminal breach of trust with regard to the value payable parcel. This accused was the Postmaster. He made a confession before the Subdivisional Magistrate, Wuntho. It appears that, before he confessed, the Subdivisional Magistrate said to him: "It is of no use your trying to get out of it, you were seen with a pair of shoes." The first question to consider is whether under section 24, Evidence Act, this remark is sufficient to invalidate the confession. A confession is irrelevant if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise having reference to the charge, proceeding from a person in authority and sufficient in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

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The following are examples of statements that have been held to invalidate confessions:—

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"You had better tell the truth."

"You had better pay the money than go to jail."

"If you don't tell the truth, I will send for the constable."

"If you tell me where my goods are, I will be favourable to you."

"If you confess the truth, nothing will happen to you."

"I only want my money; if you give me that, you may go to the devil."

"Tell me what you know about it; if you will not, I can do nothing for you."

But all these statements contain either a promise or a threat which the statement of the Subdivisional Magistrate in the present case can hardly be construed into doing.

In *Ameer Ali and Woodroffe's Law of Evidence* applicable to British India an English case is quoted *R. v. Mills* (6 C. and P., 146), in which the following words were held to invalidate a confession: "It is of no use to deny it for there are the man and boy who will swear they saw you do it." I have been unable to obtain the full report in that case. But even this statement, though nearly approaching, is not quite on all fours with the statement in the present case. There was a threat to bring two witnesses to prove the fact. The words "you were seen with the pair of shoes" hardly amounts to a threat. But even admitting that these words may be construed as a threat, the threat to come under section 24, Evidence Act, must be sufficient to give the accused grounds for supposing that by making the confession he would gain an advantage. The age, experience, intelligence, and character of the accused must be taken into consideration. Here the accused was an educated man of mature age, who had held responsible positions in the Postal Department for eleven years. Though the language used, interpreting it in the light most favourable to the accused, might be considered sufficient to overcome the mind of an uneducated and inexperienced boy, yet I have no hesitation in holding that it was not sufficient to overcome the mind of a man of the age, experience, education, and position of the accused, so as to induce him to make a confession which he must have well known would at the very least have led to his expulsion from Government service. On these grounds I must hold that the language used by the Subdivisional Magistrate, though very improper on his part, is not sufficient to invalidate the confession.

The confession is to the effect that the parcel was not paid for and was opened by the postman Bagawandin while he (the Postmaster, accused), was in his private room; that when he came out and found what had been done, Bagawandin gave him a pair of shoes from the parcel, which he accepted. The matter was thus squared and no

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S. N. MUKERJEE action was taken by the Postmaster against his subordinate, the postman for having opened a value payable parcel. The evidence of T. K. Roy, the Inspector of Post Offices, shows that, when he arrived at Pinlebu after the fire, the Postmaster (accused) reported to him that the entire cash balance and a value payable parcel No. 356 (that is, the one in question) had been consumed in the fire.

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QUEEN-EMPRESS.

Against the accused Mukerjee therefore the evidence is—

- (1) His confession that he was accessory after the fact to the opening of the parcel, and that he accepted for himself part of the contents.
- (2) His extraordinary conduct, in his position as Postmaster, in not taking any action against his subordinate.
- (3) The fact that he reported to the Inspector of Post Offices that the parcel had been consumed in the fire.
- (4) The subsequent discovery of the contents of the parcel in the possession of Ugar Singh.
- (5) The statement of his fellow-accused Bagawandin implicating him.

This evidence leaves absolutely no doubt that accused Mukerjee has been rightly convicted.

The sentences passed on accused Bagawandin, namely, one year's rigorous imprisonment on the first charge, two years' rigorous imprisonment on the second charge, and seven years' transportation on the third charge, are, considering the very serious nature of the offences, appropriate.

The sentence passed on the accused S. N. Mukerjee on the charge under section 409, Indian Penal Code, is three years' rigorous imprisonment. To determine whether this sentence is sufficient, it is necessary to consider the whole aspect of the case. Accused Mukerjee was the Postmaster and was in a position of trust. He conspired with his subordinate the postman and dishonestly converted to his own use the contents of value payable parcel. On the same day he unnecessarily kept in the Post Office in a wooden box a large sum of Government money which ought to have been in the custody of the Military Police, and also obtained and kept in the Post Office a large sum of money, a savings bank deposit made by the Jemadar. With all this money in an unsafe position in the Post Office, he left the Post Office at night in charge of Bagawandin, who, according to his own statement, he knew to be dishonest, and went to a distant village to a *pwè*. In consequence the Post Office was burned down by Bagawandin, and after the fire it was found that the money had disappeared. Admitting that there is no proof that accused Mukerjee took part himself either in burning the Post Office or in misappropri-

Evidence—24.

ating the money, these acts were a natural consequence of his conduct in conspiring with Bagawandin to steal a value payable parcel, which theft in the interests of both had to be concealed in some way, and of his conduct in unnecessarily on that very day depositing in an unsafe place in the Post office a large sum of money. The consequences must be considered in awarding the punishment, and under the circumstances, I consider that the punishment awarded is inadequate. The accused Mukerjee has been called on to show cause why the punishment should not be enhanced. He has shown cause by petition. He has advanced no reason for not enhancing the sentence, but has merely asked for a new trial. There are no grounds for ordering a new trial.

In the case of appellant Bagawandin the appeal is dismissed. In the case of appellant S. N. Mukerjee the conviction is confirmed and the sentence is altered to rigorous imprisonment for seven years, to be commuted to transportation for a like period.

S. N. MUKERJEE

v.
Q. U. S. EMPRESS.

Evidence—24, 27.

Evidence—24, 27.

Criminal Appeal
No. 20,
1897.
March
22nd.

Before G. D. Burgess, Esq., C.S.I.

NGA SHWE TAT v. QUEEN-EMPRESS.

Evidence Act 24, 27—Confessions to be of value as evidence should be free from reasonable suspicion of corrupt influences, and require some kind of extrinsic corroboration.

Evidence Act 24. Confession the making of which has been caused by any inducement, threat, or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him, irrelevant in criminal proceedings. Irregularities committed in the course of the proceedings in recording confessions and other matters. Need on the part of Magistrates recording a confession for strict compliance with the provisions of section 164, Code of Criminal Procedure, and for circumspection and the avoidance of action tending to create doubt or suspicion. Under ordinary circumstances a confession cannot be accepted as sufficient for a conviction unless it is supported by material facts established independently of the confession itself. Experience shows that unfounded confessions are not infrequently made from one motive or another natural to humanity, and that consequently the Courts have to be on their guard against being led astray by such deceptions. It is therefore the practice in general to require some support for a confession, some corroboration from facts established outside of the confession, and reasonable consistency with the surrounding circumstances about which there is no doubt.

Facts said to have been discovered in consequence of information received from a person accused of an offence must be of a kind which such information really helps to bring to light and which it would be difficult to find out otherwise before they can be treated as of any substantial probative value.

THIS appeal and the three following Nos. 21, 22, and 23 arise out of the same original case and have to be taken together.

No one has appeared either for or against the appellants.

The Sessions Judge has set out the circumstances of the case with his usual clearness and helpful attention to logical sequence.

It is shown by the evidence that the offence of dacoity was committed and that the deceased husband of the prosecutrix Ma Po was killed by the dacoits so that the commission of the offence of dacoity with murder as defined in section 396 of the Penal Code is established.

Five persons were charged with the commission of the offence, but the alleged ring-leader Tha Dun San has been acquitted.

As to the remaining four persons who were accused the Court of Session says: "The convictions rest almost entirely on the confessions," so that the case is of that class in which the difficulty is to know how far a man's own word is to be taken against himself. The appellants have either told the truth and disclosed actual misdoing on their part, or they have purposely misled the judicial tribunals before which they were brought into believing that they were telling a genuine story instead of a fictitious one, and if they have been wrongly convicted they have brought that disaster on their own heads.

Evidence—24, 27.

It is hardly necessary to say, however, that experience shows that informed confessions are not infrequently made from one motive or another natural to humanity, and that consequently the Courts have to be on their guard against being led astray by such deceptions. It is therefore the practice in general to require some support for a confession, some corroboration from facts established outside of the confession, and reasonable consistency with the surrounding circumstances about which there is no doubt, and such ordinary tests must of course be applied in the present instance which does not differ from others in requirements of the sort.

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v.
QUEEN-EMPRESS.

There is, however, one rather remarkable thing in this case, and that is that the appellants in their petitions of appeal do not so much as allude to their confessions, and this is of a piece with their conduct in the Court of Session at their trial where they not merely denied the truth of the statements recorded, but went the length of disputing that they had made any such statements at all.

There have, no doubt, been plenty of irregularities committed in the course of the proceedings, but the notion that the accused never uttered the words that have been put down as coming from their mouths is too extravagant to be entertained, at least so far as the Subdivisional Court is which the committal was made is concerned.

But though a denial of this kind is singular, it cannot be treated as prejudicial to men of the ignorant class to which the accused belong.

The dacoity took place on the 25th September. Two of the accused, Shwe Tat and Pôn Gywè, made their confessions on the 27th; the other two only in the committing Court on the 4th October. Neither of the confessions taken on the 27th September by the Township Magistrate has been recorded in accordance with law, the full certificate required by section 164, Code of Criminal Procedure, having been omitted in the form prescribed. The Township Magistrate was examined about the confession of Pôn Gywè, but not about that of Shwe Tat on this point, and in strictness the latter, it would seem, ought not to have been admitted in evidence.

In respect of Shwe Tat's confession the Magistrate acknowledges doing a strange thing. Although, by his account, the man came forward with his story, the Magistrate did not then record it but sent him off to get certain peacock rupees supposed to have been taken in the dacoity, and the confession was not recorded till about 10 o'clock at night. It is difficult to understand proceedings of this sort.

Then it appears, furthermore, that the confession was elicited by inducements of one kind or another. Shwe Hmwe, the 9th witness for the prosecution, who was at the bottom of the matter, makes the admission: "The Myoök told me that it was usual to give rewards and I told Shwe Tat that it was usual to make people witnesses for Government." The committal proceedings exhibit admissions by Shwe Hmwe more compromising still, and he should have been questioned about them and, if necessary, they should have been

Evidence—24, 27.

NGA SHWE TAT
v.
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brought on the trial record in the interests of justice. As the origin of these inducements was thus with the Magistrate, the admissibility of the subsequent confession would be a question under section 24 of the Evidence Act, but even if the confession be admissible, what value can be attached to it when made under such circumstances? But the objections to the confession do not stop here. It is proved by the evidence for the defence and for the prosecution that Shwe Tat and Pôn Gywè were taken bound outside the village and kept there for some time by the Head Constable and police till they were interrupted by Nga Kaya, 11th witness for the prosecution. Shwe Tat and Pôn Gywè allege ill-treatment by the police on this occasion, and their assertions are supported, to the extent at least of grave suspicion, by this unnecessary and unexplained action of the police.

The above grounds are really enough for refusing to accept as voluntary and credible the confessions of Shwe Tat and Pôn Gywè and if they are not received, the late and meagre statements of the other accused Po Sin and Tun Baw, which followed them at the committal, fall to the ground at the same time. But this is by no means all.

The attempt to prop up Shwe Tat's confession by the production of peacock rupees was not only childish but served to defeat its own object.

Conceive the absurdity of getting him first to give up two such rupees and some time after six. What possible reason could there be for not surrendering them all at once? Peacock rupees can be no great rarity in the land of their birth; and moreover it is in evidence that Shwe Hmwe was provided with a good stock. Another glaring difficulty occurs in the fact that although ten peacock rupees were taken, the confessions mention only eight, and that all these are represented as going to one man of the band alone, and the other three British rupees as going to another, leaving three of the robbers without any share at all.

A pair of earrings were stolen, and a genuine piece of evidence could have been put in by their production, but they are not forthcoming.

The Court of Session has rightly rejected the evidence of the 7th witness Tha Gaung, who speaks to four of the accused leaving the village at night. There are several more reasons than those stated for not believing a word that he said.

As to Shwe Tat being absent from his village the evidence is not satisfactory and his contradicted by that for the defence. Here again it is Shwe Hmwe who is the moving spirit, and he is quite untrustworthy, besides which there was no adequate reason for looking for Shwe Tat that night.

It is superfluous to mention other matters in reality, but I cannot pass over in silence the circumstances that there is a stumbling block at the threshold of the confessions in the finding that the charge against Tha Dun San is not proved, for if he was not concerned, what becomes

Evidence—24, 27.

of the whole story that when all the people of the surrounding villages were paraded for inspection, the prosecutrix Ma Po picked out Tha Dun San and two other men as being three of the dacoits and passed over the four appellants; and that with the foot-prints of the dacoits before them the police deliberately abstained from making a comparison between them and the foot-prints of these accused.

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QUEEN-EMPRESS.

The Magistrate, the police, and the accused among them have managed completely to make the discovery of the truth as near as possible an impracticable task, at least on present materials.

The confessions of the accused appellants, anyhow, are not only uncorroborated, but are inconsistent with the proved facts of the case, and cannot be relied or acted upon.

The conviction and sentence must therefore be reserved in respect of each appellant.

Evidence—25, 91.

Evidence—25, 91.

Criminal Revision
No. 855 of
1900.
September
24th.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. NGA THET.

Mr. H. M. Lütter, Government Prosecutor for the Crown.

Confession to a police-officer of having given false information cannot be proved against person making it charged under section 182 or section 211, Indian Penal Code.

The accused, Nga Thet, reported to the police that one Nga Pwin had pawned a boat which he, Nga Thet, had entrusted to him on hire, the facts stated disclosing the commission of the offence of criminal misappropriation. The next day he told the police that his report was incorrect and that he had given permission to Nga Pwin to pawn the boat. The proceedings against Nga Pwin were accordingly abandoned and a complaint was laid against Nga Thet of giving false information; he was tried and convicted under section 182, Indian Penal Code. The original information laid by Nga Po Thet at the police-station was not produced, but a Sergeant of police was allowed to give oral evidence of its terms. The second statement made to the police, to the effect that the information originally given by him was false, was admitted in evidence against the accused.

Held—that proceedings against the accused should have been taken under section 211, Indian Penal Code, and not section 182, Indian Penal Code.

Held also—that the information given by the accused could be proved only by production of the document itself or a certified copy.

Held also—that the accused's second statement was a confession, and that being made to a police-officer it was inadmissible under section 23 of the Evidence Act.

Reference :—

1, Upper Burma Rulings, 1892—96, page 24.

THE accused, Nga Thet, is said to have reported to the police that one Nga Pwin had pawned a boat which he, Nga Thet, had entrusted to him on hire, the facts stated disclosing the commission of the offence of criminal misappropriation. Next day he is said to have told the police that this report was incorrect and that he had given permission to Nga Pwin to pawn the boat. The proceedings against Nga Pwin were accordingly abandoned and a complaint was laid against Nga Thet of giving false information; he has been tried and convicted of an offence under section 182, Indian Penal Code, and has been fined Rs. 25. The case was brought to my notice by the District Magistrate who considered the sentence inadequate. On perusal of the record it appeared that there were several points for consideration. I have had the advantage of hearing the argument of the learned Government Prosecutor on these points.

In the first place, the proceedings against the accused should have been taken under section 211, Indian Penal Code, not under section 182. If his first report was wilfully false, Nga Thet falsely charged Nga Pwin with having committed the offence of criminal misappropriation and this is the offence for which he should have been tried. There is a common tendency to bring prosecutions of this kind under section

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182 rather than under section 211. But the procedure is incorrect and open to objection because it obscures the real issue and because it is irregular, as has often been pointed out, to prosecute for a minor offence when the facts disclose an offence of more gravity.

In the next place, the fact that Nga Thet gave any information to the police was not proved. Under section 154, Code of Criminal Procedure, the information given by Nga Thet had to be reduced to writing. The information was therefore a matter required by law to be reduced to the form of a document; and under section 91 of the Evidence Act no evidence could be given in proof of the terms of such matter except the document itself or secondary evidence when admissible. It has been held in the case of *Abdul Rahman** that the record of information made under section 154, Code of Criminal Procedure, is a public document and that a certified copy of it may be produced in proof of its contents. But it is clear that either the original or a certified copy must be produced and that the information cannot be proved by oral evidence. In this case, for some reasons not explained, the record of the information was not produced, but a Sergeant of Police was allowed to give oral evidence of the terms of Nga Thet's information. The result is that the Magistrate had no evidence before him of the terms of the information. The utmost that the Sergeant could say was that Nga Thet came to the station and gave some information. It has been suggested, though the Government Prosecutor was unable to support the suggestion, that this is a mere irregularity of procedure which is covered by section XV of the Schedule to the Criminal Justice Regulation. I am unable to accept the suggestion. Section 167 of the Evidence Act declares that the improper admission of evidence shall not be ground for a new trial, etc., if there is other sufficient evidence to justify the decision. But clearly in this case there was no other evidence whatever to prove the essential matter, namely the substance of Nga Thet's information. It is obvious that a decision cannot be sustained when there is no evidence in support of the charge. On this ground alone the conviction must be reversed.

The next point which has been considered is the admissibility of Nga Thet's second statement that the information which he gave originally was false. I cannot help thinking that this statement is a confession; and that, being made to a Police Officer, it is inadmissible under section 25 of the Evidence Act. There has been some discussion as to the distinction between confessions and admissions and as to whether section 25 of the Evidence Act refers to confessions made to a Police Officer by a person who is not yet accused of any offence. As regards the distinction between admissions and confessions the matter seems to me to be free from much doubt or difficulty. The section does not exclude statements or admissions of fact made to a Police Officer provided that they do not amount to admissions or

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* 1, Upper Burma Rulings, 1892—96, page 24.

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confessions of culpability. Thus, in the case of a man accused of murder I think no doubt that if the accused said: "The deceased broke into my house and attacked me with a sword and I killed him in self defence," this statement, though an admission of fact, could not be regarded in any way as an admission or confession of guilt, but as an exculpatory statement; it would therefore be admissible though made to a Police Officer. But, subject to the proviso in section 27 of the Act, if the statement amounts to a confession of guilt it is inadmissible. I do not understand that any view inconsistent with this view has been taken in any of the cases which has been cited. The word "confession" is not defined in the Evidence Act. It must be taken as used in its ordinary signification, that is, as meaning an admission of guilt.

As regards the question whether section 25 of the Evidence Act applies to confessions made by a person before he is accused of an offence, I think there can be no possible doubt. The test is the position of the person alleged to have made the confession at the time when it is proposed to prove it, not his position at the time when he is alleged to have made it. There is no warrant in section 25 of the Evidence Act nor is there authority for any other construction of the section.

It has also been suggested that in this case the confession is admissible under section 27 of the Evidence Act, as in consequence of the information given by the accused it was discovered that he had committed an offence under section 182, Indian Penal Code. The learned Government Prosecutor has been unable to argue in support of this position. I think it is obviously untenable. If that were the meaning of section 27, the statement: "I murdered A" would be admissible on the ground that the fact that the accused was guilty of the murder of A was thereby discovered. It is plain that the proviso cannot be so far reaching as this.

For these reasons I am of opinion that the second statement alleged to have been made by Nga Thet to the police was a confession of an offence under section 211, Indian Penal Code, and was therefore excluded by section 25 of the Evidence Act.

On both grounds, therefore, namely, because there was no evidence in support of the charge, and because even if the fact that Nga Thet gave information had been proved there was not sufficient evidence to show that it was false, the conviction is not sustainable. I therefore reverse the conviction and sentence and direct that the fine be refunded to Nga Thet. In all the circumstances of the case, I do not think it necessary to authorize or direct a retrial.

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*Before G. D. Burgess, Esq., C.S.I.*NGA THIN GYI *v.* QUEEN-EMPRESS.*Evidence Act, 30—Penal Code, 380—Theft. Conviction without evidence.*Criminal Revision
No. 667 of
1897.
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1st.

The accused in this case was found guilty under section 380, Penal Code, by the Subdivisional Magistrate and sentenced to two years' rigorous imprisonment. On appeal, the Court of Session confirmed the conviction, but reduced the sentence to one year's imprisonment.

The reasons given by the Magistrate for convicting were as follows:—"Maung Nyo, complainant, states: On the night of the 7th waxing Tawodwè Maung Thin (applicant in revision) and Shwe Din visited his house, and during the night property to the value of Rs. 350 was stolen from his house. Some eight days afterwards complainant heard his trousers and *passo* had been seen in a house of Kôkkoçwa; he gave the information to the guard and some time afterwards was called there and shown the exhibits in this case, and recognized the articles as being those which were stolen from his house on the night aforementioned.

"The second witness is the Sergeant of Police who held enquiries into this case and Po Kan informed him he bought from Maung Kya Byu a pair of silk trousers, one silk *passo*, and one flannel coat for Rs. 6-8-0. Articles, Exhibits Nos. 2, 6, 7, and 8, were then given up by Po Kan.

"Maung Kya Byu was then arrested and examined and he stated Maung Thin and Shwe Din had given Nga Kya Byu, Nga Kya Gyi, Nga Hman, and Nga Po, and it was divided up as follows: Nga Hman (since dead) got one black *passo*, one silk *passo*, and one pair scissors; Nga Kya Gyi got one coat, one flannel coat, and Rs. 2; Nga Po got a silk coat; and he, Nga Kya Byu, got one ruby ring, silk *passo*, silk trousers, and flannel coat. Nga Kya Gyi was then arrested, and his wife gave up one cotton and flannel coat. These are exhibits Nos. 4 and 5. Maung Shwe Din, who committed this theft with Maung Thin Gyi, cannot be found.

* * * * *

"The tenth witness saw Maung Thin and another man at 11 P.M. on the night of the theft at the south-east corner of Maung Nyo's house. This witness was within ten paces of them and did not speak to them. The eleventh witness states he met Maung Thin and Shwe Din near Maung Nyo's house about midnight and passed within three paces of him, and remembers distinguishing him as it was not very dark.

* * * * *

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"The second accused, Nga Kya Byu, states he was on his way to Kôkkogwa and passing the burying-ground he met Maung Thin and Shwe Din. Shwe Din gave Maung Hman a bundle of clothes and this was divided upon the road between Nga Kya, Nga Hman, and this accused, Nga Kya, and then went to his village, and this accused and Nga Hman returned to Kôkkogwa. The reason these articles were given Maung Hman was because he is a great friend of Shwe Din's. This witness (accused) now states he made a mistake; it was Maung Po and not Maung Thin that was with Shwe Din; Maung Po being the informer they have a down on him.

"The third accused makes a similar statement to the second accused, and states it was Maung Po and Shwe Din who were breaking up the box in the grave-yard.

* * * * *

"From the confession of Nga Kya it will be seen he stated Nga Thin Gyi and Shwe Din were the parties who broke open the box and gave out the articles. He told this same story when he was arrested to the Sergeant of Police. Rupees 53 was found in Maung Thin Gyi's house which has not been accounted for. Maung Thin and Shwe Din paid Maung Nyo a visit that evening, and the tenth and eleventh witnesses saw those two at very late and unusual hour and hovering round Maung Nyo's house. I consider these facts sufficient proof that Maung Shwe Din and Maung Thin Gyi committed this theft. I cannot for a moment credit statements of these witnesses for defence, they are at so great variance on points of what happened on dates immediately preceding and following this date which they have fixed so well. I think the evidence in this case shows Maung Thin and Shwe Din committed the theft they evidently got the valuables and divided the clothing up amongst Maung Hman dead and the two Nga Kya's, second and third accused.

* * * * *

"The second and third accused state that they were unaware the property was stolen. Can it be imagined that any property would be divided after the manner in which this was divided in a remote spot in the jungle at dead of night if it was honestly come by? I think not. Both these two accused have previous convictions and are liable to enhanced punishment under section 75, Indian Penal Code."

The second and third accused were tried and convicted under sections 414 and 411, Penal Code, respectively.

Pointed out—That the Magistrate had convicted the applicant-accused without evidence, there being absolutely nothing against him except that he had visited prosecutor's house as he was in the habit of doing, and had been seen near it some hours before the theft.

Any statement made against him by his fellow-accused before the trial (which would not be evidence anyhow) had been withdrawn, and even if this had not been so, they were not under trial for the same offence and their statements would not have been relevant. Conviction and sentence reversed.

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The trial of this case is far from creditable to the Magistrate, who is no tyro of the third class, just beginning his work on the Bench, but is a Subdivisional Magistrate of the first class, who has been exercising judicial powers for years.

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He has convicted the applicant-accused without evidence.

The applicant-accused visited the prosecutor's house, as he was in the habit of doing, on the night of the theft.

He is said to have been seen near the house the same night by one witness about 11 o'clock, by another about 12.

Whether this was about the time of the visit or not does not appear, but if the witnesses might properly be there at that time the accused might be at the same place at the same time with equal innocence.

Even this alleged circumstance, however, is contradicted by the evidence for the defence, which is that of several witnesses speaking to the same thing.

The matter is, however, of no consequence, as it proves nothing. The hour of the theft is given as about 3 A.M., and there is no necessary connection between the circumstances.

The Magistrate had no other evidence whatever to go upon, astounding as it may seem.

Another accused in the case, Kya Byu, told the police a story about his getting with others part of the stolen property from applicant. It was a cock and bull story, but even if it had been otherwise, it was no evidence against accused, as it is necessary, but ought not to be, to point out.

At the trial Kya Byu again mentioned accused Nga Thin's name at first, but corrected this at once and said, as the third accused also did, that the man meant was not Nga Thin but Nga Po.

Consequently there was nothing here either against applicant-accused.

Even if Kya Byu had stuck to his story, however, it would not have been evidence against applicant who was not being jointly tried for the same offence but for a different one from Kya Byu.

The other accused were old offenders, and a discerning Magistrate would immediately have seen through their device to fasten their guilt on some one else even without the guidance of the rules of evidence.

Indeed nothing was wanted but common sense to burst the bubble.

The miscarriage of justice in this case is apt to shake confidence in the Courts, both original and appellate, for the Court of Session, while reducing the sentence, has maintained the baseless conviction in appeal.

The conviction and sentence are reversed.

Applicant-accused's money, which was wrongly taken from him and given to prosecutor, must be restored.

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Criminal Revision
No. 1098 of
1897.
December
16th.

Before G. D. Burgess, Esq., C.S.I.

NGA PO KYA v. QUEEN-EMPRESS.

Mr. Z. M. D'Silva and Mr. C. G. S. Pillay
—for appellant.

Mr. H. M. Lütter, Government Pro-
secutor—for the Crown.

Evidence Act, 59, 155, 165—Evidence—Discrepancies in—Treatment of—

Conviction under section 161, Penal Code, for taking illegal gratification.

Discrepancies in evidence must be carefully considered and their effect allowed for, but when they can be fairly reconciled by explanation or naturally and reasonably accounted for, evidence, otherwise trustworthy, cannot be put aside, although its value may be *pro tanto* impaired, solely because of their occurrence.

Measure of punishment.

Extracts from Judgment of Court of Sessions in appeal.

IN this case the appellant, Po Kyaw, who was a Myoök in charge of the Ava township in the Sagaing district, has been convicted under section 161, Indian Penal Code, of having accepted an illegal gratification from one Maung Po Tin, and has been sentenced to undergo rigorous imprisonment for six months and six days.

The substance of the charge against the appellant is that, on the occurrence of a vacancy in the thugyiship of Tada-u, he demanded a sum of Rs. 700 from Maung Po Tin in consideration of obtaining the appointment for him, and that he actually received Rs. 500 and recommended Po Tin for the post. The undisputed facts of the case are that, on the 6th June 1896, the Deputy Commissioner of Sagaing ordered the transfer of Maung Sin, thugyi of Tada-u, to another village and directed the Subdivisional Officer, with the help of the Myoök, to hold an election with a view to the appointment of a successor. An election was held on 18th June 1896 and Po Tin obtained most votes. He was duly recommended by the Myoök (appellant), and this recommendation was endorsed by the Subdivisional Officer. The Myoök's report is not dated, but it was in the hands of the Subdivisional Officer on the 21st June 1896, and by him returned to the Myoök for submission to the Deputy Commissioner on either the 21st or 22nd June. The report is said to have been approved by the Deputy Commissioner on the 23rd June. As, however, the proposal to transfer Maung Sin and to revert the thugyi whom he displaced was not approved by the Commissioner, it turned out that there was no vacancy at Tada-u. The election and other proceedings became void and Po Tin did not receive the appointment. After this the Myoök made three reports unfavourable to Maung Sin, who had been transferred to a place called Zegyo. Finally, on 3rd December 1896, Po Tin filed a formal complaint before the Deputy Commissioner charging the Myoök (appellant) with receiving a bribe of Rs. 500.

These are the undisputed facts. The case for the prosecution is that the appellant sent for Po Tin and told him he would be made thugyi of Tada-u if he paid him the (Myoök) Rs. 700. Of this amount, Rs. 500 were to be paid on demand and the balance when Po Tin received his commission as thugyi. This is said to have happened in the waning of *Nayôn*, that is, between the 26th May and the 8th or 9th June 1896. The conversation took place in the house of the appellant, who was then living next to Po Tin. The latter was summoned to the house by a peon named Chit Pu. Po Tin collected the money and kept it by him. On a date which has not been clearly established, but which the District Magistrate takes to be the 22nd June 1896, and which Po Tin says was a fortnight after the above conversation and in the waxing of 1st *Wasô*, that this, between the 10th and 23rd June 1896, the appellant is said to have sent another peon named Nga Paw

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to call Po Tin. It is alleged that Po Tin went with Nga Paw and a man called Po Tin Gale to the appellant's house and gave him the sum of Rs. 500 in ten rolls of Rs. 50 each. The appellant, it should be noted, was then living in another house some 300 yards away from Po Tin. When the money was given, Nga Paw and Tin Gale were actually present, and two peons named Chit Pu and Nga Gyi were under the house and heard all that passed. On receiving the money, the appellant is said to have shown Po Tin the report which he was submitting to the Deputy Commissioner, through the Subdivisional Officer, recommending him for the appointment.

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In support of this case there is the direct evidence of Po Tin, Po Tin Gale, Nga Paw, Nga Chit Pu and Nga Gyi, who profess to have seen or heard the giving of the bribe. There is also evidence, which has some bearing on the case, that Po Tin did raise a sum of Rs. 400 about the time of the election for the thugyiship of Tada-u. Besides this, it has been shown that after the transfer of Maung Sin to Zegyo, the appellant sent in unfavourable reports about him. The inference is that he was exceedingly anxious that Maung Sin should be dismissed in order that there might be a vacancy for Po Tin. Finally, there is the evidence afforded by the alleged tampering with the appellant's diary for June 1896. The Magistrate believes that an entry to the effect that the appellant reached Tada-u at midnight on 22nd June has been added to the diary for the purpose of showing that he could not have been in Tada-u on the evening of that day, which seems most probably to the day on which the bribe was given.

On behalf of the appellant the taking of the bribe is of course denied. Evidence has been produced that no visitors came to the Myoök's house at night during the period within which the bribe must have been given. It is also alleged that the case has been got up by Maung Po, the Myoök's head clerk, who had a grudge against the Myoök; and by Maung Po Tin, in respect of whom the Myoök is said to have received information as to his complicity in a theft case; and evidence has been given to support this allegation and to show that Maung Po and Po Tin not only threatened the Myoök, but suborned some witnesses and tried to suborn others. Witnesses have been produced to prove that on the 22nd June the Myoök was kept back by a storm and that he was late in reaching Tada-u. There is also evidence that Po Tin admitted that he had lost a large sum of money in gambling, and that this was about the time of the alleged bribing. The fact that the witnesses for the prosecution have been unable to give the date on which the bribe was given has been the subject of adverse comment; and serious discrepancies in the evidence of the witnesses for the prosecution have been pointed out as discrediting their testimony. There is also evidence that the appellant is a man of good character and believed to be trustworthy.

The direct evidence of Po Tin and the other witnesses said to have been within sight and hearing at the time of the transaction may be examined first. If this evidence is to be believed, the case is fully established. Po Tin has told his story on three separate occasions; twice to Colonel Butler, Deputy Commissioner of Sagaing, and once at the trial. It is admitted that there are discrepancies between his statements at various times. The most important of these consists in the difference between his two statements as to whether he told any one that the Myoök had demanded money. At first he said he told no one besides his wife; afterwards he said that he had told his wife, his sister-in-law, and his aunt. I do not think there are any other discrepancies of much importance or any which cannot be reasonably accounted for by the interval which elapsed between the record of the statements by the Deputy Commissioner of Sagaing and the trial at Mônnywa. As between the evidence of Po Tin and that of the witnesses who corroborate him, the most striking inconsistency is that which concerns the date of the alleged bribing. It is very important to fix this date, and it proves to be a matter of great difficulty. Po Tin says that he paid the money to the appellant three or four days after the election, which was on the 18th June 1896. This date is fixed

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Nga Paw, who thinks that the election took place on the 17th June, says that the money was paid 25 or 30 days after that date. The difference is somewhat serious; but there are other indications of the date. Po Tin says that he began to collect money about 10 or 12 days after his first conversation with the Myoðk. The order for an election of a thugyi is said to have reached the Myoðk on the 8th June. The month of *Nayôn* ended on 9th June. It was in *Nayôn* that the Myoðk first spoke to Po Tin. He cannot have spoken to him before he knew there was to be a vacancy. Therefore he must have spoken to him either on the 8th or 9th June. Ten days after that brings us to the 19th June, on which day Po Tin says he borrowed Rs. 100 from Nyo Gyi. The document on which this sum was borrowed has been produced (Exhibit D D) and bears that date. It is not absolutely certain, but I understand from Po Tin's evidence that he got this money from Nyo Gyi before he sent to get the rest from Ma Gyi. He did not get any money from Ma Gyi, but he got some gold bangles, which he got pawned for Rs. 300. Now, it is said that when the bangles were got from Ma Gyi, Po Tin's brother Maung Hmin went to Mandalay to pawn them and returned with Rs. 300 next day. Po Tin kept the money for two days under his pillow and then took it to the Myoðk. It seems to me quite conceivable that the bangles were got from Ma Gyi on 19th June, and it is stated by Ma Le Nyo, Po Tin's sister-in-law, that it was on the next day that Maung Hmin went to Mandalay. If this is so, then as he did not return till the 21st, and as the money was kept for two days at least after that it would seem that the 22nd could not have been the date on which the money was given (as alleged) to the appellant. But I am not sure that this is quite clear. If the money was brought from Mandalay on the morning of the 21st and paid out on the evening of the 22nd, Po Tin might fairly say that he kept it for two days before paying it away. It is even possible that the gold was obtained from Ma Gyi on the 18th and that Maung Hmin returned from Mandalay on the 20th, as in that case the Rs. 300 would still have been obtained after the Rs. 100 had been obtained from Nga Nyo Gyi. On careful examination, I cannot see that, so far, there is anything in the evidence of Po Tin and the story of the pawning of the gold inconsistent with the supposition that the money was paid on the 22nd June 1896. It should be mentioned, however, that Maung Hmin says the money was raised some 15 days after the election.

Po Tin's evidence may be tested, and the date fixed, in another way. The election was held on the 18th June; the Myoðk's report was in the hands of the Subdivisional Officer on 21st June and was by him returned to the Myoðk for submission to the Deputy Commissioner, to whom it is said to have been delivered on the 23rd June. It could therefore have been shown to Po Tin on the 22nd June or on the 21st, but it seems clear that the Myoðk was not in Tada-u on the 21st June. The date must therefore apparently be the 22nd June.

Extract from the Judgment of the Court of First Instance.

It might have been on the 22nd, as the Myoðk had got the lists back from the Subdivisional Officer, but on looking at the diary, I see that an entry has been added, "Arrived after midnight." Why should this entry have been made unless it was to show that the Myoðk was not at home at 8 P.M. when Po Tin says he saw him in his house. I had no means of checking this at the time I wrote my judgment, but now that I have seen the Myoðk's travelling allowance bill for June I find that on the 22nd June he left Ywathit at 9 A.M.

and arrived at Tada-u, a distance of 10 miles upstream, at 12 A.M. This was not checked either by the Subdivisional Officer or the Chief Clerk in the Deputy Commissioner's office, but the Head Assistant in the Commissioner's office noticed it and underlined it with purple ink and in the margin wrote "Noon." Mr. Hill, the Subdivisional Officer, says it is almost impossible to go from Ywathit to Tada-u in 3 hours, as you are going against a strong current nearly the whole time, and the average time will be from six to seven hours, so that he must have arrived at Tada-u at about 4 P.M. On looking over this travelling allowance bill carefully, I find that on

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the 26th June the Myoðk left Tabè at 6 P.M. and arrived at Tada-u at 10 P.M., but from the diary I find he arrived at Tada-u before breakfast and then attended Court, so that I am afraid the travelling allowance bill is not to be relied on.

There are several alterations and additions in the diary about which I asked the accused. Take, for instance, that on the 20th June. It will be seen that the sentence "Rode to Mithwaydaik and slept there" looks as if it had been added. But the space between the first two lines of the 20th and the first line of the 21st is greater than between any other two lines, and again it will be seen that the whole of the entry for the 26th June has been written twice over the first two lines as well as the addition.

The Myoðk could not explain why this was done. The words "Arrived at midnight" on the 22nd instant look as if they had been written and then blotted before the ink was dry and written over again to make it black, but the other entries on that day and on the 23rd have not been treated in that way.

Great stress has been laid by the Magistrate on the alterations which are supposed to have been made in the diary of the Myoðk. It is to be regretted that they were not noticed at an earlier stage of the proceedings and that the peons and other witnesses were not examined as to the Myoðk's movements. The peons who are witnesses against the Myoðk ought to have been able to say whether the Myoðk had been on tour or had returned from tour on the day on which took place the transaction which they described. The diary of the Myoðk has been produced for the period from 16th to 30th June 1896. It does seem as if entries for 20th, 22nd

and 23rd June had been altered, or at least written in after the rest of the diary. The entry of the 22nd June is the most important, as it states that the Myoðk arrived at midnight; and if this is true, it is clear that he was not in Tada-u on the day which is most probably the day on which the bribe (if given at all) was given to him.

On another point Po Tin's evidence may be tested. He says that about a month after he paid the money, he went and demanded its return; but the Myoðk told him to wait as he had reported the thugyi, Maung Sin, for putting in his brother-in-law as a clerk. He went again, ten days later, and was told that the Myoðk had reported Maung Sin for burking a theft case. If these dates are at all accurate the evidence cannot be true, as it is certain that the two reports refer to were not made till September, more than two months after the giving of the bribe. Both the reports appear to have been made at about the same time, as the Subdivisional Officer's remarks on them are dated 16th and 17th September 1896 respectively.

There is one more point in Po Tin's evidence which requires comment. He says that the appellant, on receiving the bribe, showed him the report he was making on the election. But according to Mr. Hill's evidence, the report was placed by him in a closed cover and given to the Myoðk to send to the Deputy Commissioner. If, therefore, the money was paid on 22nd June, as seems likely, either this statement is not true, or the document shown by the Myoðk is a copy, or the Myoðk opened the cover and took out the report. The point is not of very great importance, but it should be considered for what it may be worth.

I turn now to the evidence of the witnesses who corroborate Po Tin.

There is a man named Po Tin Gale, and there are three persons named Chit Pu, Nga Paw and Nga Gyi. The story told by these witnesses seems to be fairly consistent. The only point on which two of them, Chit Pu and Nga Gyi, are directly contradicted is as to the construction of the platform under the house on which they were sitting or standing. They say that this platform was planked, while the house-owner says that the platform was originally of bamboo and was not planked till *Wagaung* last year, that is, till August or September 1896 (apparently he meant, second *Wazo*, i.e., July-August; but in either case, he contradicts the evidence of the peons). This is corroborated by the evidence of Kyin Mya, thirteenth witness for defence.

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The fact that Po Tin did raise Rs. 400 about the middle of June 1896 seems to be reasonably certain. There are some discrepancies in the evidence on this point, but I do not see any ground for doubting that the facts are substantially as stated by the prosecution.

It is also clear that the Myoök did report unfavourably of Maung Sin, the thugyi of Tada-u, who had been transferred to Zegyo. He sent in three reports after it had been decided that there was to be no vacancy in consequence of Maung Sin's transfer.

* * * * *

On a review of the case as a whole, I have the following remarks to make. A charge of this kind is very easy to make; it is not very easy to sustain, but it is exceedingly difficult to refute. The evidence of the giving of the bribe in this case is direct and detailed. Apart from the story of the attempt by the Myoök to get up a case against the complainant, Maung Po Tin, there does not seem to be any reason why Po Tin should have wished to get the Myoök into trouble. He says he was not on bad terms with him, and this statement has not been contradicted. On the other hand, it may be said that there was no sufficient reason why the bribe should have been offered. Unless the election was fudged, Po Tin was the popular candidate, and in all ways, apparently, suitable for the appointment. But Po Tin may well have thought that it would be best to make things safe. Again, it does strike me as an extraordinary circumstance that the Myoök should have taken a bribe in the open way in which he is said to have taken this money, in the presence of two witnesses, neither of whom seems to have been in his confidence. It is also a very remarkable coincidence that Chit Pu and Nga Gyi should both have been under the Myoök's house at the very moment when the bribe was given. Their evidence is also discredited by the evidence about the platform under the house. But I do not think very much importance need be attached to this. The fact that Po Tin did raise Rs. 400 has a bearing in the case, though of course it does not conclusively prove that the money was required for the purpose of bribing the appellant. I do not attach much importance to the reports made by the Myoök against the thugyi Maung Sin. He seems to have had reason for them and to have been supported by the Subdivisional Officer.

The evidence for the defence appears to me to be very unsatisfactory.

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The addition to the diary under date 22nd June is a very suspicious circumstance, and I agree with the Magistrate that the story of the journey to Tada-u and the occurrence of the storm does not appear worthy of credit. The evidence of Ye Gyan and Paw Shun also appears to me to be of little value. After the most careful and anxious consideration I have come to the conclusion that the case against the appellant has been established beyond reasonable doubt. Without being entirely satisfied as to the evidence of the three peons, I am of opinion that the balance of probability is in favour of the substantial truth of Po Tin's story. I do not think that sufficient cause has been shown why Po Tin should make up this story if it was not true, get it supported by so many witnesses, and strengthen it by the fact that he raised money at the time of the alleged gift to the appellant. The only points against the acceptance of Po Tin's evidence are the inherent improbabilities. But these do not seem to me to be sufficient to justify its rejection. I think, also, that the appellant has signally failed to rebut the case for the prosecution, and I cannot help attaching weight to the alteration in the diary, which seems certainly to have been effected, and to the improbable nature of a good deal of the evidence for the defence.

For these reasons I see no reason to differ from the conclusion of the Magistrate. The sentence is certainly not unduly severe. I dismiss the appeal.

ORDERS IN REVISION.

THE applicant for revision in this case has been convicted under section 161 of the Penal Code for taking an illegal gratification as a

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public servant and has received a sentence of six months and six days' rigorous imprisonment.

The addition of six days to six months has been made for the purpose of removing a bar to appeal.

The accused has appealed, and his appeal has been dismissed by the Court of Session.

Both that Court and the District Magistrate who tried the case have gone into it fully, thoroughly, and carefully.

No question of law has arisen, and the only question has been the question of fact whether the accused did the act constituting the offence punishable under the section of the Penal Code under which he was charged.

The propriety of the sentence has not been challenged, and the application for revision is confined to objection to the soundness of the conviction.

The sentence passed upon the applicant-accused at first was not open to appeal; he applied in revision, and the difficulty was removed by an exercise of the jurisdiction of this Court, somewhat exceptional, but proper under the circumstances, as the difficulty was due to a mistake of the convicting Magistrate.

A retrial having been ordered, a sentence was imposed against which an appeal lay to the Court of Session. As the Sessions Judge had had some concern with the preliminary departmental enquiry into accused's conduct, motion was made, at the instance of the Local Government, for the transfer of the appeal preferred by accused to the High Court. The accused then represented that if the appeal were heard here and were decided against him, he would be unable to apply in revision, as he would otherwise be at liberty to do. The appeal was accordingly transferred to another Court of Session. And now this application for revision is made, and I have gone through the proceedings, which, though they have been more than once before me for reference, are new to me as a whole, the perusal taking the best part of a day.

The applicant-accused has thus enjoyed every sort of advantage and much more than he had any claim to.

By the common law every man accused of an offence can claim and is entitled to a fair and impartial trial, but nothing more. He has no right of appeal, unless the Legislature chooses to confer it by statute; much less has he a claim to anything beyond an appeal.

The principles which guide a Superior Court in respect of the exercise of its special powers of revision have been pointed out more than once and need not be repeated. A second appeal on the facts is not admissible, and no evasion of the plain provisions and distinct directions of the law can for one moment be permitted.

At the same time this Court has never, I am certain, hesitated in the past, and would never, I am equally convinced, hesitate in the future, to exercise any power it possesses, notwithstanding any

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apparent difficulty arising from mere technicalities immaterial to the merits, for the purpose of righting a wrong or preventing the smallest substantial miscarriage of justice.

The objections taken in this case to the findings of fact of the Courts below, both in the application for revision and in the argument at the hearing, are of a somewhat general character, and the learned Government Prosecutor for the Crown has complained with some reason of the difficulty of discovering any definite point which has not already been fully discussed and considered in appeal, a difficulty in which the Court has shared as was indicated at the hearing.

After the conclusion of the hearing one of the learned Advocates for applicant was, at his own request, further heard in the matter, with the consent and in the presence of the Government Prosecutor.

The objection resolve themselves into this, that it was wrong to convict in the face of the improbability of the story for the prosecution and the discrepancies in the statements of the witnesses by which it was supported, and of the evidence for the defence.

As to the latter, it may be said at once that such portion of it as was directed towards showing the existence of a conspiracy to bring a false charge against the accused, and towards discrediting the complainant and his witnesses, was beneath serious notice and could impose upon no one but a tyro in judicial investigation and in the ways and methods of Burman perjurers.

Regarding the discrepancies, many are such as it would be childish to pay any attention to. Those that are of any relevancy or importance relate to dates, and for the most part appear to be of a kind to be expected from witnesses who are speaking of events a considerable time—nine or ten months in this instance—after their occurrence.

If any fair-minded and unprejudiced man will test his own recollection of dates of which he has not made a note, or which he has had no special reason for fixing in his memory, he will be obliged to acknowledge the extreme difficulty, if not the impossibility, of precision.

With Burmese witnesses the difficulty becomes an impossibility almost inevitably. That the witnesses here have not attempted to be more precise than they have been is a point in their favour. In false cases it is usual to find a cut-and-dry date fixed upon, and nothing could have been easier than to have selected that plan in the present proceedings.

There is, however, one point with respect to dates which is of real importance, and it is the only point for the sake of which it has been worth while to take the trouble which has been taken with this case.

The credibility of the complainant's story that he paid a bribe of Rs. 500 to the accused depends upon his having possession of that sum at the time when the money must have been given if it was given at all.

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The complainant acknowledges that he had the command of no more than a hundred rupees to begin with. It is proved that he raised a further sum of Rs. 400, but did he obtain this balance within the time within which the bribe must have been given? This is doubtless a crucial test.

It is assumed for the defence that the money could have been given on no date but the night of the 22nd June; at least that appears to be so from the last contention urged.

It does not seem quite certain that this restriction is absolutely required, but let it be assumed that it is.

Of the amount wanted, Rs. 100 was obtained by a mortgage, the deed relating to which bears a date corresponding with the 19th June.

The remaining Rs. 300 was raised in Mandalay, where the witness sent for the money slept one night. This was after the borrowing of the Rs. 100 and there was a night lost before starting for Mandalay. Complainant kept the whole of the money for two nights before giving it to accused, and therefore, runs the argument for the defence, history cannot be true.

But this contention is unsound. There is no absolute difficulty in the matter at all. It can be explained in several ways, and it is of no consequence which is the correct explanation.

According to the record, complainant did not say positively that he had the money for two nights. What he did say was—page 14—“I had the Rs. 500 for about two nights.” Under any circumstances he could have had the money on the night of the 21st June, and he may have counted the 22nd as another night. He may have got the Rs. 100 before the bond was written on the stamped paper on the 19th, a very common occurrence. The witness who fetched the money may have been in Mandalay on the night of the 19th instead of the 20th, or there may be some other means of accounting for the time. Even if complainant were badgered into saying two nights’ interval for certain, allowance must be made for possible mistake or lapse of memory. If it is meant to maintain seriously that no such allowance ought to be made, I merely wonder at such an argument and have nothing to say to it.

Another difficulty put forward is that complainant was shown the papers concerning his election as thugyi when he gave the bribe according to his own account, such papers having been before the night of the 22nd placed in an envelope by the Subdivisional Officer for despatch to the Deputy Commissioner.

Far from being an objection, however, this very circumstance supplies strong corroboration of the truth of the story for the prosecution. It is possible that what complainant was shown was an office copy which he would not distinguish from the original. But no such supposition is required, because the papers were actually at that time in the hands of accused himself, and what obstacle would

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the opening of a cover be to a man who wanted Rs. 500? Before conveying the papers to the Deputy Commissioner and losing control of the affair for ever, it would naturally be important to secure the money, bargained for, and therefore the evidence which goes to fix the night of the 22nd June for the transaction, receives incidentally confirmation stronger than the most elaborate designs could have devised.

Having satisfied myself that this part of the evidence is consistent not only with possibility, but with probability, I need not in revision discuss other points in the case.

The Courts below have not only taken fully into consideration the contradictions and discrepancies which appear to exist, but they have gone further and have, it would seem, supposed the possibility of discrepancy where there may have been none. In regard to the endeavours of accused, for instance, to make a vacancy for complainant when the first plan accidentally failed, it would appear that the complaints against another thugyi made for this purpose, although they did not reach the Deputy Commissioner till later than complainant's statements would imply, had their origin much earlier, and that in reality the information which he says accused gave him on the subject goes to establish his veracity.

With respect to the alleged improbability of the transaction, it has not been explained how accused could have acted with greater caution and circumspection than he did. He was unaware of the presence of at least some of the witnesses, and if at the last moment he had turned round and rejected the tender of the bribe, he would have had to submit to two grave drawbacks—the danger of exposure and the loss of the money.

That a man in accused's position would forget his duty to the laws of his country and to himself as an honest man by doing as he is said to have done is unhappily a thing which is not unknown to experience.

That the accused acted in this manner is a conclusion which, on the whole record of his trial, it was not only not unreasonable for the Courts below to arrive at, but which it would be highly unreasonable for any Court not to come to.

The question of the adequacy of the sentence passed has not been raised by the learned Government Prosecutor for the Crown or otherwise, and, considering the course of the case, I am not disposed now to go into it.

But it is no doubt a somewhat lenient sentence even after reckoning its consequences.

If a similar case of abuse of authority and breach of duty should come before this Court it would have to be carefully considered whether it should be allowed to leave it with so lenient a punishment as the present.

The application for revision is dismissed.

Evidence 114—54.

Evidence—114—54.

Before G. D. Burgess, Esq., C.S.I.

MI MYIT v. QUEEN-EMPRESS.

Evidence Act, s. 114.—Presumptions of existence of facts which the Court thinks likely to have happened, regard being had to the Common course of natural events and human conduct—Presumptions arising from the relation of husband and wife jointly charged with being concerned in the commission of the same offence. Section 54—Irrelevancy of fact of previous conviction.

*Criminal Appeal
No. 6 of
1897.
January
28th.*

The two accused were husband and wife and both were in possession of the stolen property within such a short time of the theft as to raise the usual presumption against them of being concerned in such theft if they were unable to rebut it and they had done nothing to rebut it.

Held,—that the general presumption is that a wife acts under the influence and control of her husband, and there was no reason to doubt the correctness of such an inference in the present case, but just the contrary.

Under the law as it now stands, since amendment, in section 54 of the Evidence Act, the fact that the first accused, the husband, had a bad character, owing to previous conviction or otherwise, was irrelevant; but the admissible evidence was amply sufficient to fasten the guilt of principal offender, that is, of thief, upon the first accused.

That being so, the guilt of the second accused, his wife, the appellant, must be confined to the offence of assisting her husband by dishonest possession or dishonest disposal of the stolen property under section 411 or section 414 of the Penal Code.

APPEAL No. 16 by Nga Paik, the other accused in the case which has been presented but not yet admitted, may be taken into consideration at the same time as this appeal.

The two accused are husband and wife, and both were in possession of the stolen property, a carpet, within such a short time of the theft, a fortnight or three weeks perhaps, though it may have been less, as to raise the usual presumption against them of being concerned in such theft if they are unable to rebut it, and they have done nothing to rebut it beyond telling a story of the second accused taking the carpet in person from an unknown man, which is neither corroborated nor intrinsically probable. Moreover, contradictory accounts have been given by accused of the way in which they acquired the carpet, and an attempt has been made to disguise the ownership by obliterating the name marked on it.

It is quite obvious that both the accused were in possession of stolen property with knowledge of its character, and the only real question is, what share of guilt can properly be attributed to each.

The District Magistrate has treated the first accused as the thief, and with perfect justness apparently. It was he alone who is proved to have been first in possession of the carpet and to have disposed of it by using it to redeem a blanket; the carpet was large and presumbably heavy and on the occasion of the second pawning, was carried by first accused, so that it is more likely to have been stolen in the first instance by a man than a woman, and the first accused as the hus-

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band of the second may reasonably be presumed to be the leader and controller in anything that might be done by him and his wife. The general presumption is that a wife acts under the influence and control of her husband, and there is no reason to doubt the correctness of such an inference in the present case, but just the contrary.

Under the law as it now stands, since amendment, in section 54 of the Evidence Act, the fact that the accused has a bad character, owing to previous conviction or otherwise, is irrelevant; but the admissible evidence is amply sufficient to fasten the guilt of principal offender upon the first accused Nga Paik.

This being so, the guilt of the second accused-appellant Mi Myit is confined to the offence of dishonest possession or dishonest disposal of stolen property under section 411 or section 414 of the Penal Code. The appellant Mi Myit has been convicted under the latter section and correctly, whether section 411 is also applicable or not. For her offence she has been sentenced to one year's rigorous imprisonment, and it is not clear that this is equally correct. The offence in itself was not a grave one; it was a first offence, and it was committed by a young woman of 28 acting under the direction of her husband. The sentence therefore appears unduly severe, and it is accordingly reduced to one of six months' rigorous imprisonment.

The appeal of the other accused Nga Paik must be rejected as regards the conviction under sections $\frac{380}{75}$, Indian Penal Code, on the grounds set out above.

As to the sentence of seven years' transportation, it is moderate enough for a man convicted thrice previously, one of the convictions being for robbery with a sentence of four years' rigorous imprisonment. It would have been better that first accused should have been committed for trial to the Court of Session, and his appeal would now be admitted for the purpose of making an order to that effect if the present offence had been more serious.

The District Magistrate has ordered the confiscation of the petticoat, which was part of the price given for the carpet at its second pawning, and the crediting of the proceeds of sale to Government. The principle upon which this order has been made is not understood, the carpet having been recovered and restored to the owner, and should be explained by report.

Evidence 114—133.

Evidence—133.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS *v.* NGA TUN BAW AND TWO OTHERS.

Evidence 114, 133—Approver or accomplice—Evidence of—Corroboration.

The ground of appeal in the case is that the convictions are based solely on the evidence of an accomplice and on the confessions of accused persons tried at the same trial for the same offence.

Held,—that, although under ordinary circumstances corroboration of an accomplice must be afforded by independent evidence, the substantive rule of law is that a conviction is not illegal merely because it is based on the uncorroborated evidence of an accomplice.

References—

21 W.R., Crl. 69—70.

Amir Ali and Woodroffe's Law of Evidence, 808-9, 200 and 812.

I.L.R., 9 All., 528, 554.

* * * * *

THE ground of appeal in the case of each of the three appellants is that the convictions are based solely on the evidence of an accomplice and on the confessions of accused persons tried at the same time for the same offence. It is urged that it is a settled rule of practice that the evidence of an approver or accomplice must be corroborated in material points by independent evidence. As against the three appellants there is the evidence of Ta I'o, who was granted a pardon under section 337, Code of Criminal Procedure, and this is corroborated only by the confessions of Nga Kaing and Nga Aung, two other persons tried at the same trial for the same offence. It is no doubt a sound rule, in ordinary circumstances, that corroboration of an accomplice must be afforded by independent evidence. But the rule is not without exceptions. The substantive rule of law is that a conviction is not illegal merely because it is based on the uncorroborated evidence of an accomplice (section 133, Evidence Act). As a matter of practice, the presumption which the Court is allowed to draw by the provisions of section 114 of the Evidence Act, namely, that an accomplice is unworthy of credit unless he is corroborated in material particulars, is usually drawn. But the sequel to the illustrations to sections 114 clearly shows that the presumption is not necessarily binding and that in exceptional cases it does not arise. The effect of these two sections has been stated as follows:—

“On the whole the result (of these sections) appears to be that the legislature has laid it down as a maxim or rule of evidence resting on human experience that an accomplice is unworthy of credit against an accused person, *i.e.*, so far as his testimony implicates an accused person, unless he is corroborated in material particulars in respect of that person; that it is the duty of the Court which in any particular case has to deal with an accomplice's testimony to consider whether this maxim applies to exclude that testimony or not; in other words, to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case, though at the same time the Court may rightly in *exceptional* cases notwithstanding the maxim, and in the absence of this corroboration, give credit.

Criminal Appeal
No. 99 of
1898.
October
17th.

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to the accomplice's testimony against the accused, if it sees good reason for doing so upon grounds other than, so to speak, the personal corroboration." (*Queen-Empress v. Sadu Mundul*, 21 W. R., Criminal 69, 70, cited in Messrs. Amir Ali and Woodroffe's *Law of Evidence*, pages 808-9.

A similar rule was laid down by Sir John Edge in *Queen-Empress v. Gobardhan*, I.L.R., 9 All., 528, 554 (cited, *ibid.*, page 809) in the following terms:—

"Although, as a general rule, it would be most unsafe to convict an accused person on the uncorroborated evidence of an accomplice, such evidence must, like that of any other witness, be considered and weighed by the Judge, who, in doing so, should not overlook the position in which the accomplice at the time of giving his evidence may stand, and the motives which he may have for stating what is false. If the Judge, after making due allowance for these considerations and the probabilities of the story comes to the conclusion that the evidence of the accomplice, although uncorroborated, is true, and the evidence, if believed, establishes the guilt of the prisoner, it is his duty to convict."

It is therefore for the Court to say in each case whether the accomplice's evidence is to be believed, bearing in mind the ordinary rule stated in illustration (b) of section 114, but not overlooking the remarks on that illustration which are, it need hardly be said, merely suggestive and not exhaustive, and the provisions of section 133 of the Evidence Act. It will not do, as has been observed, merely to state the ordinary rule formally for the sake of evading it. On the other hand, it is clearly not the intention of the law that illustration (b) of section 114 should be treated as an invariable rule and that section 133 should be a dead-letter. There is one other point which may be mentioned. It has been said that the evidence of one accomplice does not really corroborate that of another accomplice, and that the confession of an accused person taken into consideration under section 30 of the Evidence Act should not be regarded as corroborative of the accomplice's evidence (*see* remarks and cases cited at page 200 and page 812 of Messrs. Amir Ali and Woodroffe's *Law of Evidence*). But this must be taken as a general rule only and not as applicable in all cases. A confession must be considered and the accomplice's evidence must be weighed, and the Court cannot be prevented from taking into account their bearing on each other.

In the present case, Tha Po, the accomplice, who was afterwards pardoned, made a full confession on 22nd May 1898. In this confession he did not mention the three appellants, but he said that four men from Shwebe village, whose names he did not know, were among the dacoits. Nga Kaing, one of the accused in the case, is said to have been arrested on 22nd June 1898. His confession, implicating the three appellants, was recorded on the day of his arrest. From his confession it appears that, on the night preceding his arrest he had slept in Tha Po's house. It is also admitted that Tha Po was not placed under arrest, though his confession was recorded as that of an accused person. Nga Kaing adhered to his confession at the trial a few days after his arrest. At the trial Nga Aung, another accused

Evidence 114—133.

person, also implicated the appellants. Tha Po gave evidence on oath and considerably amplified his first statement. The fact that his evidence is much fuller than his confession does not seem to have attracted the Magistrate's attention, nor does Tha Po seem to have been asked to explain the differences between the deposition and the confession.

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The District Magistrate has not given very sound reasons for considering that the evidence of Tha Po and the confession of Nga Kaing do not require corroboration, or that they sufficiently corroborate each other. It is true that the *alibi* set up by the appellants was not proved; but this can hardly be considered sufficient to corroborate the tainted evidence against them. If it had been clear that the District Magistrate had attentively considered in detail and compared the confessions of Nga Kaing and Tha Po and the latter's deposition and had taken into account the possibility of collusion between them, and if the District Magistrate had given good reasons for thinking the accomplice's statements worthy of credit, I should not be prepared to dissent from his conclusion as regards the guilt of the appellants. As it is, I am unable to see that the case is one which should form an exception to the ordinary rule. I think there is a very reasonable doubt whether the three appellants were really concerned in the dacoity of which they have been convicted. I therefore reverse the conviction of and sentences on Tha Zan, Po Kin, and Tun Baw, and direct that they be acquitted and released.

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Evidence—133.

Evidence—133.

*Criminal Miscella-
neous
No. 18 of
1898.
September
23rd.*

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v NGA SWE.

Evidence—Conviction on—of a man sent by Police Officer with marked money to purchase liquor.

The accused was convicted on the evidence of a man who was sent by a Police Officer with marked money to purchase liquor. The District Magistrate considered that it was improper to obtain convictions in this way and directed the discontinuance of the practice.

*Held—*that a policeman or other person procuring an illegal sale of liquor to obtain a conviction is not an accomplice whose evidence, if uncorroborated, ought not to be accepted as sufficient for conviction.

Reference—

Printed Judgments, Lower Burma, 1897, page 365.

IN this case the accused was convicted on the evidence of a man who was sent by a Police Officer with marked money to purchase liquor. The Magistrate who tried the case reported the action of the police to the District Magistrate as he considered that the police and the witness had abetted the commission to the offence. The District Magistrate considered that it was improper to obtain convictions in this way and directed the discontinuance of the practice. The Commissioner and Sessions Judge has referred to me the question whether the procedure of obtaining convictions by spies is improper and ought not to be followed, or whether the police should adopt the procedure in cases where illicit sale is suspected.

All that it is necessary for me to say is that I concur in the view taken by the Special Court of Lower Burma in *Bastin's* * case in which it was held that a policeman or other person procuring an illegal sale of liquor to obtain a conviction is not an accomplice whose evidence, if uncorroborated, ought not to be accepted as sufficient for conviction.

The propriety of the procedure is a question for consideration in each case on its merits. As is pointed out in the judgment cited above, it is necessary to exercise great care in cases of this kind. A case has occurred within my knowledge in which the informer persuaded a person in legal possession of excisable liquor to sell him a small quantity, though the person persuaded was unwilling to do so and was not in the habit of selling liquor. The impropriety and illegality in such a case are obvious. But under proper safeguards, and with the exercise of due caution, I do not think that the procedure is open to valid objection.

* P. J. L. B., 1897, page 365.

Evidence.

See also page 218.

SECTIONS 3, 80, and 159. *See also* page 31.

SECTIONS 25, 26 and 60. *See also* page 47.

SECTIONS 57 and 101. *See also* page 31.

SECTIONS 106 and 114. *See also* page 196.

SECTION 114. *See also* pages 227 and 242.

Excise—21, 49, 59.

Excise -- 21, 49, 59.

*Criminal Revision
No. 196 of
1900.
April
23rd*

Before H. Thirkell White, Esq., C.I.E.

PIR MAHOMED, GAFUR AND M. S. WILKS *v.* QUEEN-EMPRESS.
Mr. R. C. J. Swinhoe—for applicants. | Mr. H. M. Lütter, Government Pro-
secutor—for the Crown.

Meaning of the term "dispose of" in Excise License Form No. VII.

The first accused was the holder of a license in Excise Form No. VII for the retail vend of fermented liquor in a bar. The second accused was his servant in charge of the bar. The third accused ordered beer and caused it to be given to the two soldiers by the barman (second accused). The first accused, the licensee, was at the time on the premises and was cognizant of what occurred. The first and second accused were convicted under section 49 of the Excise Act of selling fermented liquor without a license and thereby contravening section 21 of the Act. The third accused was convicted of abetting the commission of this offence.

Held—that the licensee and his servant did not “dispose of” the liquor to the European soldiers within the meaning of the license.

Held—that there was no breach of the license and no contravention of section 21 of the Excise Act in the sale to the third accused.

Reference—Maxwell on the Interpretation of Statutes, Third Edition, pages 461—476.

THE applicant; Pir Mahomed, was the holder of a license, in Form VII of the forms prescribed by the rules under the Excise Act, for the retail vend of fermented liquor in a bar. Gafur was his servant in charge of the bar. Pir Mahomed and Gafur have been convicted under section 49 of the Excise Act, of selling fermented liquor without a license and thereby contravening section 21 of the Act. Mr. Wilks has been convicted of abetting the commission of this offence. Pir Mahomed and Gafur have also been convicted, under section 52 of the Excise Act, of having committed a breach of a condition of the license granted under that Act by keeping open the bar after the hour of midnight.

So far as the charges of illicit sale are concerned, the facts are not disputed. The applicant, Wilks, was in a billiard-room adjacent to and communicating with the bar kept by Pir Mahomed. Two European soldiers were also there. Wilks ordered beer and caused it to be given to the two soldiers by the barman, Gafur. Pir Mahomed was on the premises at the time and was cognizant of what occurred. Gafur at first declined to supply beer to the soldiers, but his objection was overruled by Mr. Wilks.

On these facts the District Magistrate has held that there was a breach of section 49 of the Excise Act. The grounds of this opinion are stated as follows:—

“ These facts seem to me to constitute a distinct breach of section 49 of the Excise Act. It is quite evident from the statements of Gafur and Pir Mahomed that they felt at the time that the supplying of the beer thus was not covered by their license. Condition V of the license is clear and this was a very distinct indirect disposal of beer to European soldiers, even if the story of the accused is admittedly true.

Excise—21, 49, 59.

"It is argued for the accused that 'dispose' must be taken to mean 'dispose of with some advantage to oneself' and that here there was no such disposal by the licensee-holder; but this interpretation can hardly stand as there are such things as disposition by gift pure and simple. The other point raised is that the disposal must have been by the licensee himself and that, if he had rightly under cover of his license disposed of liquor to Wilks who was legally entitled to be served, its subsequent destination was no concern of the licensee. But it appears to me that it was, and for this reason the words 'directly or indirectly' were inserted in Condition V. Both Gafur and Pir Mahomed were well aware at the time the beer was ordered that Wilks intended it should be drunk by the soldiers and not himself; they knew they could not directly supply the soldiers, and it was evident from the objection to serve raised at first that it was felt that this indirect method of supply was wrong."

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v.
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For the applicants, it is argued that there was no breach of the Condition V of the license; that there was no sale, directly or indirectly, to the soldiers; and that in the license the words "dispose of" must be taken to mean "dispose of by way of sale or in some cognate manner," or, if they have a wider meaning, that the condition is not in accordance with the Act.

Section 49 of the Excise Act renders punishable any person who sells fermented liquor (to cite only so much of the section as applies to this case) in contravention of section 21 of the Act. Section 21 prohibits sale except under, and in accordance with the terms of, a license granted under the Act. One of the terms or conditions of the license in this case is that the licensee shall not knowingly sell or dispose of any liquor to any European soldier, either directly, or indirectly, under cover of the license. The District Magistrate's view, as I understand it, is that the licensee in this case indirectly disposed of beer to European soldiers by supplying them at Mr. Wilks' request; that in so doing he was acting otherwise than in accordance with terms of his license; and that the sale which was an integral part of the transaction was therefore in contravention of section 21 of the Act. The chain of reasoning is not obvious at first sight; but on careful analysis it seems probable that the District Magistrate's position is sustainable. If the sale to Wilks had been a merely colourable transaction, and if Wilks had merely bought for, and as the agent of, the soldiers, there would be no doubt of the illegality of the sale. If, on the other hand, Wilks had called for a glass of beer for himself and then given it to a soldier, the licensee, when he sold the liquor, being ignorant of the purchaser's intention, there would obviously have been no offence. The present case is more complex. The licensee and the barman knew that the beer was to be supplied to the soldiers. If the supply to the soldiers was a contravention of the license, and if the condition thereby infringed is a legal one, I think the District Magistrate was right in holding that the sale was in contravention of section 21 of the Excise Act. It was part of the transaction of disposal and cannot be separated from it. Although the learned Government Prosecutor felt himself unable to support the conviction under section 49, I am of opinion that the District Magistrate's view is correct and that, if his premises are

Excise—21, 49, 59.

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accepted, the conclusion which he draws is sound. It is urged that there was a breach of the license. If so, I think that the sale, which was an inseparable incident of the breach, was illegal.

There remain the almost equally difficult questions whether the licensee in this case did dispose of liquor to European soldiers and, if so, whether the condition of the license so interpreted is one which can legally be imposed. The District Magistrate has construed the words "disposed of" as if they were equivalent to "supply." He considers that a gift of liquor to a soldier would be a disposition within the meaning of the clause; and the same position has been sustained in argument. On the other hand, it is contended that the words "dispose of" must be understood as being *ejusdem generis* with the word "sell" which immediately precedes them. The contention has been forcibly pressed by the learned advocate for the applicants. It is urged that the expression "dispose of" must be understood to be an expansion or explanation of the term "sell," introduced for the purpose of prohibiting transactions of the nature of a sale though not ostensibly such. On this point reference has been made to *Maxwell on the Interpretation of Statutes (Third Edition)** from which the following passages may be cited:—

"When two or more words, susceptible of analogous meaning, are coupled together, *noscuntur a sociis*, they are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is, the more general is restricted to a sense analogous to the less general. * * * The Bankrupt Act, which makes a fraudulent 'gift, delivery, or transfer' of property an act of bankruptcy, includes only such deliveries or transfers as are of the nature of a gift; that is, such only as alter the ownership of the property; but it does not include a delivery to a bailee for safe custody. * * * An Act which prohibits the 'taking or destroying' the spawn of fish would not include a 'taking' of spawn for the purpose of removing it to another bed; for the word 'destroying' with which 'taking' is associated, indicates that the taking which is prohibited is dishonest or mischievous. And in an Act which made it penal to 'take or kill' fish without the leave of the owners of the fishery, the same kind of 'taking' was similarly held to have been intended. An act which prohibits the 'having or keeping' gunpowder does not apply to a person who 'has' gunpowder for a merely temporary purpose, as a carrier, the kind of 'having' intended by the Act being explained by the word 'keeping' with which it is associated. * * *

"It is, however, the use of a general word following one or more less general terms *ejusdem generis* which affords the most frequent illustration of the rule under consideration. * * * In the abstract, general words, like all others, receive their full and natural meaning. * * * But the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words, or, in other words, as comprehending only things of the same kind as those designated by them; unless, of course, there be something to show that a wider sense was intended. * * *

"Of course the restricted meaning which primarily attaches to the general word in such circumstances, is rejected when there are adequate grounds to show that it was not used in the limited order of ideas to which its predecessors belong. If it

* pages 461—476.

Excise—21, 49, 59.

can be seen from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow particular words, are nevertheless to be constructed generally, effect must be given to the intention of the Legislature as gathered from the larger survey." PIR MAHOMED
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The above rules of construction must, I think, be applied in determining the intention of the framer of the condition in the license held by the first accused. The point for determination has not, so far as is known, been decided hitherto by this Court, though it has been on the verge of discussion more than once. In my opinion, after prolonged and careful consideration, the arguments on behalf of the applicants must prevail. I think it is in accordance with the ordinary rules of construction, as stated in the foregoing extracts, to hold that, in a condition which obviously deals with sale, the expression "dispose of" refers and was intended to refer to a disposition of the nature of a sale. I can find nothing to indicate that a wider meaning was intended. If a wider meaning had been intended, it would have been easy to use the expression "supply" or some other unambiguous term. To apply the expression under discussion to gifts or other transfers not of the nature of a sale is, in my opinion, to strain the law. I therefore conclude that, in this case, the licensee and his servant did not "dispose of" liquor to European soldiers within the meaning of the license. There was then no breach of the license and no contravention of section 21 of the Excise Act in the sale to Wilks. The fact that the licensee and his servant apprehended that they might be committing a breach of the license cannot affect the question.

It is not necessary for me to decide the question whether the Chief Revenue Authority could legally impose on the licensee a condition prohibiting the supply of liquor otherwise than by way of sale. But as the point has been fully argued, I may say that, as at present advised, I see no reason to think that such a condition would be invalid or illegal.

As regards the conviction for breach of license in keeping the bar open after midnight, I see no reason to interfere with the Magistrate's finding. The question is entirely one of fact and there was sufficient evidence to justify the conviction. There is nothing to show that the Magistrate took a perverse or unreasonable view, or that he failed to consider the evidence on both sides.

The result is that the convictions under section 49 and sections 49 and 59 of the Excise Act are reversed and that the fines imposed under those sections will be refunded to the three applicants. The convictions under section 52 of the Excise Act will stand.

Excise—37, 38, 41, 57.

Excise—37, 38, 41, 57.

Criminal Revision
No. 1046.
1898.
December
3rd.
—

Before H. Thirkell White, Esq., C.I.E.

AH HIN *v.* QUEEN-EMPRESS.

Mr. Z. M. D'Silva—for applicant.

Excise 37, 41, 57.—Prosecution instituted on report of an Assistant Superintendent of Police empowered under sections 37 and 38, Excise Act.

The conviction in the case was impugned—

(i) on the ground that the Magistrate was not empowered to take cognizance of the case in view of the provisions of section 57 of the Excise Act, 1896;

(ii) on the ground that the arrests were illegal.

Held—that under section 41 of the Excise Act the power to arrest includes the power to send the accused before a Magistrate. Prosecutions can therefore be instituted on the report of an officer empowered under sections 37 and 38 in cases in which he has arrested or caused the arrest of the accused.

Held—also that an illegal arrest does not necessarily invalidate a trial.

References.

Printed Judgments, Lower Burma, 1897, page 369.
1, U.B.R., 1892—96, page 100.

THE conviction in this case is impugned—

(i) on the ground that the Magistrate was not empowered to take cognizance of the case, in view of the provisions of section 57 of the Excise Act, 1896;

(ii) on the ground that the arrests were illegal;

(iii) on the merits.

The prosecution was instituted on the report of an Assistant Superintendent of Police, who has the powers of an Excise Officer under sections 37 and 38 of the Excise Act (Finance and Commerce Department Notification No. 84, dated 16th October 1888). Under section 41 of the Act, the power to arrest includes the power to send the accused before a Magistrate. An Assistant Superintendent of Police is therefore clearly an Excise Officer within the meaning of section 57 of the Excise Act, and prosecutions can be instituted on his report, at least in cases in which he has arrested or caused the arrest of the accused. I think therefore that the prosecution in this case was regularly instituted.

As regards the legality of the arrest, I understand that the arrest was effected by or in the presence and under the orders of the Assistant Superintendent of Police. Under section 37 of the Excise Act, an Excise Officer empowered thereunder can arrest a person engaged in the unlawful sale of spirit, &c. It is probable therefore that the arrest of the petitioner was not illegal. It seems, however, to have

 Excise—37, 38, 41, 57.

been unnecessary. As was pointed out in Criminal Revision No. 1617 of 1892* "it seems generally a piece of needless severity to arrest a licensee at all." But the illegality of the arrest, even if the arrest were held to be illegal, would not affect the validity of the trial. There is no provision of law, so far as I am aware, which invalidates proceedings before a Court because the accused has been arrested illegally or irregularly. People who are illegally arrested have their remedy. They cannot plead the illegality of the arrest in bar of trial, still less after trial can they obtain the reversal of the conviction on this ground. For an analogous ruling reference may be made to the case of *Taw Aung*.†

AH HIN
v.
QUEEN-EMPRESS.

On the merits, I have no doubt that the conviction was correct.

* * * *

* 1, U. B. R., 1892—96, page 100.

† P. J. L. B., 1897, page 363.

Excise—49.

Excise—49.

Before G. D. Burgess, Esq., C.S.I.

Criminal Revision

No. 1300.

1896.

February
9th.

QUEEN-EMPRESS v. { 1. AHYU
2. PRIVATE P. TIERNAY.

Mr. H. M. Lütter, Government Prosecutor—for the Crown.

Excise Act, s. 49—Sale of liquor in breach of license to European soldier—Abetment of sale—See Penal Code, s. 108—Sale to agent—Contract Act, ss. 230, 231, 233.

The first accused, the licensee of a liquor shop, was tried for sale of liquor in contravention of the conditions of his license to a British soldier, and the latter was tried for abetment of such sale. The purchase was effected through the agency of a Native of India employed by the soldier for the purpose. The condition of his license (Form VI), which the first accused was tried for breaking, was clause 9, namely, "that he do not knowingly sell or dispose of any spirits or liquor to any European soldier or any Burman, either directly or indirectly." The first accused was acquitted on the finding that he did not know the liquor sold was intended for a European soldier. The soldier was, however, convicted of abetment of an illicit sale.

Held—that it is only when the licensee *knows* that the vendee is a European soldier or a Burman that he is forbidden to sell to him. Under the Contract Act there might be a sale to the agent of an undisclosed principal, as in this case, which would bring the licensee under the provisions of the clause, but for the presence in it of the word 'knowingly.' But the soldier did not intend that the licensee should know that the sale was in reality to himself and not to the Native of India. On the contrary he meant to conceal this.

Consequently neither was an offence committed by the licensee, nor was any abetment committed by the purchaser, inasmuch as the latter never tried, nor intended, to cause any offence whatever to be committed.

Conviction and sentence quashed accordingly.

Reference.—1 U.B.R. 1892-96, p. 105.

IN this case the convicting Magistrate was called upon for report in the following order passed by the Officiating Judicial Commissioner, Mr. Justice Copleston:—

"The police arrested Ahyu, the licensee of a liquor shop, and sent him up for trial on a charge of selling liquor to an European soldier contrary to the terms of his license. The Magistrate issued a summons to the private soldier concerned under section 49, Excise Act, for abetment of illicit sale of spirits. Both persons were charged.

"The soldier stated that he sent a Native to buy the liquor, giving him Rs. 1-8-0, apparently the price of the liquor. The Magistrate found that the licensee Ahyu committed no offence as he did not know the liquor was for an European soldier.

"2. He adds '———' however abetted the offence of knowingly selling though it was not committed.' This conviction appears erroneous. The Magistrate has not gone into any details to show that the Native messenger sold to the soldier, but grounds his decision solely on the fact that the soldier obtained possession of liquor which he was not entitled to buy.

"It would appear that the act abetted must, in order that an abetment may be punishable, be such an act as might but for some disqualification of the actor be an offence. Now the act of Ahyu was not and could not be an offence. He sold to a person he was entitled to sell to and who was entitled to buy.

"But before passing orders I will ask the Magistrate to state any further reason he may have to justify the conviction."

A case of a somewhat similar character is reported in 1 U. B. R. 1892-96, p. 105.

Excise—49.

The Magistrate has defended the conviction with considerable spirit. He says :—

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"I still think the conviction is right—

"(1) Ahyu's license forbids him knowingly to sell liquor to a European soldier either directly or indirectly.

"(2) Ahyu sold liquor to a European soldier indirectly, so doing an *act* which the rules are intended to prevent.

"(3) Ahyu therefore committed an act which would be an offence if committed by him.....with the same intention as Tiernay, Tiernay's intention being that liquor should be sold to a European soldier.

"(4) Tiernay abetted the doing of that act inasmuch as he intentionally aided the doing of that act.

"(5) Tiernay abetted the commission of that act.

"(6) Therefore Tiernay abetted an offence.

"(7) The offence that Tiernay abetted was sale of liquor in contravention of a license for the sale of liquor, although that offence was not committed.

"To sum up, it is surely not denied that if Ahyu sold the Native the liquor, knowing all the facts of the case, he contravened his license by selling liquor to a soldier indirectly and thereby committed an offence. Tiernay abetted an act which only wanted knowledge on the part of the actor to constitute an offence. Tiernay is guilty whether the actor had such knowledge or not.

"The intention of the law seems to be that a person who intentionally contributes to a result which the legislature has aimed at preventing shall be punished and shall not benefit by keeping in ignorance of the nature of the transaction of the other parties concerned therein.

"I re-submit the proceedings, with these remarks, to the District Magistrate. If the District Magistrate disagrees with me, I hope he will point out where I am wrong, and, if convinced, I will say so.

"As to the facts of the case I will not say that Tiernay admitted that he sent the Native to the liquor shop. Probably he would have said he did not tell the man where to go. But Tiernay was seen by the police officers to leave the shop and enter a gharry a little way down the road. They then seized him with the bottle in his possession. They also said they had seen him stand in front of the counter and buy the whiskey, but it was night and they might not have seen exactly what occurred, and I did not regard this as proved.

"I held, however, under the circumstances that Tiernay intended the liquor to be bought at the shop and must have known it was bought there. There can be no doubt that he was a perfectly knowing party to the infraction of the rules, and knew that the liquor came from Ahyu's shop. He said he went there first and asked for a bottle of whiskey and was refused.

"Even if Tiernay did not know where the liquor would be procured by the Native he intended him to buy it, and he ought to have known what is in fact the law that without a license no one can sell whiskey, and that those who have licenses are forbidden to sell whiskey to soldiers directly or indirectly, *i.e.*, that he (Tiernay) was forbidden to buy whiskey except at his regimental canteen. In this latter concise form the state of the law must be well known to every soldier in Shwebo."

The principal support for the Magistrate's contentions appears to be found in Explanation 3 to section 108 of the Penal Code which is as follows :—"It is not necessary that the person abetted should be "capable by law of committing an offence, or that he should have the "same guilty intention or knowledge as that of the abettor, or any "guilty intention or knowledge."

In the present instance, however, there is the difficulty to be met whether in fact the accused Tiernay abetted any offence at all or not.

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Clause 9 of the license Form VI of the first accused Ahyu provides "That he do not *knowingly* sell or dispose of any spirits or liquor to any European soldier or to any Burman, either directly or indirectly; and the use of the word "*knowingly*" is of the greatest importance.

It is only where the licensee *knows* that the vendee is a European soldier or a Burman that he is forbidden to sell to him. Under the Contract Act there might be a sale to the agent of an undisclosed principal, as in this case, which would bring the licensee under the provisions of the clause, but for the presence in it of the word *knowingly*. No doubt the second accused Tiernay intended that a sale should be effected to him through his agent or servant, the Native of India, whom he sent for the liquor, but there is nothing to show that he meant the first accused, the licensee, to *know* that the sale was to be to him and not to the Native, who was the ostensible purchaser; and obviously to have let the licensee into the secret would have been presumably to defeat the object in view, which was of course to procure the liquor by a trick.

Consequently, neither was any offence committed by the licensee, nor was any abetment committed by the purchaser, inasmuch as the latter never tried, nor intended, to cause any offence whatever to be committed.

Under these circumstances, there being no offence, the conviction of the second accused and the sentence upon him must be quashed.

Excise—49.

Excise—49.

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS v. A. FUT.

Mr. H. M. Lütter, Government Prosecutor—for the Crown.

Criminal Revision
No. 520 of
1897.
July 15th.

Excise Act, s. 49—Illegal sale of liquor to a Burman alleged to be a servant of person entitled to buy—Question of fact: Whether sale is really to the Burman or to some one employing him?—Contract Act, ss. 78, 90, 220.

In this case the accused, a licensed vendor of liquor, was tried under section 49 of the Excise Act for the illegal sale of a bottle of brandy to a Burman, no licenses for the sale of spirits to Burmans being granted in Upper Burma.

The Magistrate found that the spirits were sold in the honest belief that they were for the Burman's master, a person to whom they could be lawfully sold under the license, and not for the Burman himself. The master gave evidence that he had pointed out the Burman to accused as a person to whom he could supply liquor on his account, and that he had been in the habit of sending the Burman for liquor accordingly.

The accused was acquitted, and the District Magistrate referred the proceedings for revision, with the remarks that he was in doubt as to whether the acquittal was good in law, and, if it were, that it would furnish an easy excuse in almost every case where a licensee was prosecuted for selling liquor illegally to a Burman.

The Government Prosecutor was instructed by the Court of Sessions to support the acquittal which the Magistrate challenged.

Held,—that though, no doubt, a licensee ran considerable risk in such a case the question seemed to be merely one of fact whether the sale was really to the Burman or to some one employing him, and if the Burman was the agent of a disclosed principal, the sale was to the principal and not to the agent.

It was proved here that there was a sale to the master and consequently there was no sale to the Burman, who merely took delivery for his master.

References:—Contract Act, sections 78, 90, 220,—1 U. B. R., 1892—96, p. 100, 1 U. B. R., 1897—01, page 184.

IN this case the accused, licensed vendor of liquor, was tried under section 49 of the Excise Act for the illegal sale of a bottle of brandy to a Burman, no licenses for the sale of spirits to Burmans being granted in Upper Burma.

The Magistrate found that the spirits were sold in the honest belief that they were for the Burman's master, a person to whom they could be lawfully sold under the license, and not for the Burman himself. The master gave evidence that he had pointed out the Burman to accused as a person to whom he could supply liquor on his account, and that he had been in the habit of sending the Burman for liquor accordingly. Accused was acquitted, and the District Magistrate has referred the proceedings for revision.

He says: "This defence is established, but it seems to me doubtful whether it is good in law. If so, it would furnish an easy excuse in almost every case where a licensee is prosecuted for selling liquor illegally to a Burman"

Excise—49.

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There is no doubt that a licensee runs a considerable risk in letting a Burman have liquor, as has been pointed out in Criminal Revision No. 1895 of 1892.*

But in each case the question seems to be merely one of fact whether the sale is really to the Burman or to some one employing the Burman.

If the Burman is the agent of a disclosed principal, the sale is to the principal and not to the agent—see sections 78, 90 and 220 of the Contract Act and *Queen-Empress v. Ah Yu*.†

It was proved here that there was a sale to the master, and consequently there was no sale to the Burman, who merely took delivery for his master.

The Sessions Judge has instructed the Government Prosecutor to support this acquittal, which he has done, and there appears to be no doubt that it is correct.

* 1 U.B.R., 1892—96, p. 100.

† Page 184.

Excise—49, 52.

Excise—49, 52.

Before G. D. Burgess, Esq., C.S.I.

A HEIN v. QUEEN-EMPRESS.

Mr. R. G. F. Swinhoe—for applicant.

Excise Act, 1896, ss. 21, 49, 52, 60—Excise Act, 1881, 42.

Section 21 of the Excise Act provides that—

“No spirit, fermented liquor, or intoxicating drug shall be sold except under, and in accordance with the terms of, a license granted under the provisions hereinafter contained.”

In Upper Burma retail licenses, with the exception of those for the vend of *tari*, contain a condition that the licensee “do not knowingly sell or dispose of any foreign spirit or foreign fermented liquor to any European soldier, or to any Burman, either directly or indirectly, under cover of his license.”

The effect is that there is no license to sell any liquor, except *tari*, to a Burman, and consequently any person, whether a licensee or not, who sells such liquor to a Burman, sells in contravention of section 21, and thereby commits the offence defined in section 49. Therefore as a penalty is provided in section 49, that section and not section 52, is applicable to such illicit sale.

The accused, the holder of an excise license in Form No. XII for the retail vend of foreign spirit and foreign fermented liquor, was convicted in a summary trial under section 49 of the Excise Act for sale of spirits to two Burmans and sentenced to pay a fine of Rs. 200 or undergo one month's rigorous imprisonment in default. The Magistrate gave as his reason for imposing so heavy a fine that a very light sentence of fine would obviously be no deterrent to a man able to afford to pay Rs. 4,600 for his license. The Magistrate also directed that of the fine realized Rs. 50 each should be given to the Police Sergeant and the *Akwetgaung* concerned in the prosecution as a reward under section 60 of the Act.

The accused applied to the High Court for revision of the Magistrate's orders, and raised various objections; but the argument was principally directed to the question whether the offence committed, the finding of fact as to which was not in dispute, properly fell under section 52 or section 49 of the Excise Act. It was contended that the main intention of section 21 was to prevent the sale of spirit and fermented liquor by licensed persons and such acts as a sale by retail where a license for vend by wholesale only had been granted. The conditions which a licensee must observe were put down in his license, and, if he transgressed any of them, it was comparatively a small matter for which the law was content to provide the limited punishment permitted by section 52, and reference was made to the case reported at page 373, *Selected Judgments and Rulings, Lower Burma*, in which the Special Court treated a conviction under section 42 of the old Excise Act corresponding to section 52 of the present Act as correct under circumstances of a kind similar to those of the present case.

Held,—that it did not appear that the attention of the Special Court had ever been called at all to the point which had to be dealt with here. It had been the practice of this Court to hold in such cases that the offence committed fell under section 49 of the Excise Act, and that view seemed to be clearly correct.

Section 21 of the Excise Act provides that—

“No spirit, fermented liquor, or intoxicating drug shall be sold except under and in accordance with the terms of, a license granted under the provisions hereinafter contained.”

In Upper Burma retail licenses, with the exception of those for the vend of *tari*, contain a condition that the licensee “do not knowingly sell or dispose of any foreign

Criminal Revision
No. 926 of
1897.
September
20th.

Excise—49, 52.

A HEIN
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"spirit or foreign fermented liquor to any European soldier, or to any Burman, either directly or indirectly, under cover of his license."

The effect is that there is no license to sell any liquor, except *tari*, to a Burman, and consequently any person, whether a licensee or not, who sells such liquor to a Burman, sells in contravention of section 21 and thereby commits the offence defined in section 49. Therefore as a penalty is provided in section 49, that section and not section 52, is applicable to such illicit sale.

The accused had, therefore, been rightly convicted under section 49, but the fine of 200 rupees was undoubtedly severe for a first offence and for a breach of rule of no particularly serious kind, and it was accordingly reduced to one of 50 rupees.

If the conviction had been under section 52, no reward would have been payable to the officers who contributed to it. Discretion is no doubt demanded in the grant of rewards so that Excise officers and others may not be led to attempt licensees to break the law by employing persons to whom they are not allowed to sell to make purchases.

Reference—S J.L.B., p. 373.

THE District Magistrate has not instructed the Government Prosecutor to argue this case as might have been expected, since the main object of the application for revision is to obtain a ruling whether section 49 or section 52 of the Excise Act is applicable to an excise licensee who sells spirituous liquor in a way not provided for in his license.

The Magistrate has convicted under section 49 of the Excise Act for sale of spirituous liquor to two Burmans and has imposed a fine of Rs. 200 on the ground that a very light sentence of fine would obviously be no deterrent to a man able to afford to pay Rs. 4,600 for his license.

The objections in the application for revision are stated as follows :—

- (1) "For that petitioner submits that the conviction should be
"under section 52 and not section 49 of the Excise
"Act.
- (2) "For that petitioner is a license-holder and has sold in
"accordance with the terms of his license, but to a
"wrong class of persons.
- (3) "For that, if every breach of the conditions of a license is
"a breach of section 21 there is no use in the part
"of section 52 which refers to breaches of conditions
"of a license.
- (4) "For that the punishment is out of all proportion to the
"offence.
- (5) "For that the gifts of Rs. 50 each to the Sergeant and
"Akwetgaung is a direct encouragement to them to
"employ Burmans to come and induce license-holders
"to break the law."

The argument has been principally directed to the question whether the offence committed, the finding as to which is not in dispute, falls under section 52 or section 49 of the Excise Act, and it has been contended that the intention of section 21 is to prevent the sale of spirits and fermented liquor without license, and such acts as

Excise—49, 52.

a sale by retail where a license for vend by wholesale only has been granted. The conditions which a licensee must observe are set down in his license, and, if he transgresses any of them, it is comparatively a small matter, for which the law is content to provide the limited punishment allowed by section 52. Reference has been made to the case at page 373 of the Selected Judgments and Rulings, Lower Burma, in which the Special Court treated a conviction under section 42 of the old Excise Act corresponding to section 52 of the present Act as correct under circumstances of the kind similar to those now under discussion. It may be said at once, however, that the attention of the Special Court never seems to have been called at all to the point which has to be dealt with here.

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It is always a pleasure to listen to an argument from Mr. Swinhoe, for he criticises with much acumen and brings forward various points with great ingenuity, and it is decidedly an advantage that questions of the kind should be raised and determined definitely. But in this instance there seems to be no room for reasonable doubt as to the construction and meaning of the law.

The entry of the various conditions in the license is made for the express purpose of rendering the licensee liable to forfeiture of the license if he fails to conduct himself in strict accordance with his obligations. In the form of license used—No. XII here—it is laid down: "it is required of the holder of this license, as a condition of its remaining in force, that he duly and faithfully perform and abide by the following conditions."

If he does not do as required, the license is liable to be cancelled, but this is a matter quite apart from the criminal punishment of the licensee. Section 52 of the Act renders a licensee liable to a fine of fifty rupees if he "breaks any rule under this Act or any condition of a license granted under this Act for the breach of which rule or condition no other penalty is hereby provided," and it not only makes a licensee so liable but any person. It seems clear that this section was introduced *ex abundanti cautela* so that nothing should be left out. It was a contraction of the mesh of the net to prevent the escape of the smaller fry of fishy practices. The more important offences against the Act or specially defined and provided for, and among them is sale. Section 49 provides the punishment for selling in contravention of section 21. Section 21 again says that "no spirit, fermented liquor, or intoxicating drug shall be sold except under, and in accordance with the terms of, a license granted under the provisions hereinafter contained."

Consequently no one can sell unless he has a license, and, if he has a license, he can sell only to the precise extent defined in his license.

If he sell to a person, or at a place, or a kind of liquor, to which the license does not extend, he is virtually selling without a license, because he has no license to sell as he is doing.

Excise—49, 52.

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Therefore when a licensee in Upper Burma sells spirits to a Burman he is selling without license, or at least not in accordance with its terms, inasmuch as there is no license to sell to Burmans. License form No. XII makes it a condition that sale to Burmans is not to be effected. The result is that the licensee has a license to sell to persons other than Burmans and, in some instances, European British soldiers, and, if he sells to either of those classes, he transgresses the prohibition in section 21 just as much as if he had no license at all.

It has been the practice of this Court to treat cases of the present kind as coming under section 49, and no good reason appears for doubting the correctness of the practice. A licensee may of course commit a breach of his license which would bring him under section 52 only, by keeping his shop open after hours for example; but if he adds an illegal sale to such breach, he then brings himself within the reach of section 49 as well.

The conviction must accordingly be sustained.

The sentence is, however, undoubtedly severe for a first offence and for a breach of rule of no particularly serious kind, and the measure of punishment adopted by the Magistrate cannot be accepted as entirely suitable.

There can be no question also that cases of this sort offer considerable temptation to abuse by the Police or other Excise Officers, and that Magistrates should therefore be careful in apportioning rewards. It is very easy to concoct cases of the present description, and to harass licensees with the fear of such prosecution. To do anything that could encourage malpractices of the kind would be bad policy in respect of the disposal of excise licenses which must depreciate in value if the holders are exposed to improper interference and annoyance. The fine under the circumstances may properly be reduced to fifty rupees.

As the persons to whom a reward has been granted are not represented in these proceedings, there will be no interference with the order for a reward on the present occasion.

It is to be observed that, if the conviction had been under section 52, no reward could have been allowed under section 60.

Explosives—5,—7.

Explosives—5,—7.

Before H. Adamson, Esq.

QUEEN-EMPRESS v. NGA YE.

Explosives Act IV of 1884—Rules framed under sections 5 and 7—Possession of explosives.

*Criminal Revision
No. 206 of
1899.
May
1st.*

Accused was convicted under Rule 5 of the rules for the manufacture, possession and sale of explosives, for possessing three cartridges of blasting powder and three detonators.

Held—that as cartridges and detonators are “ammunition” as defined in section 4 of the Arms Act, the accused might properly have been convicted under section 19 (f) of that Act. The rules in question do not apply to the possession of explosives of this nature in moderate quantities.

ACCUSED’S house was searched for opium and in it were found three cartridge of blastings powder and three detonators. He has been convicted under Rule 5 of the rules for the manufacture, possession and sale of explosives in Burma, for possessing an explosive without a license. If the Magistrate had read Rule 4, he would have seen that licenses under these rules are not required for the possession of explosives of this nature in moderate quantities. The rules are not applicable to the case. But cartridges and detonators are “ammunition” as defined in section 4, Indian Arms Act, and the accused might properly have been convicted under section 19 (f) of that Act.

Ferries—12, 14, 15, 25, 27.

Ferries—12, 14, 15, 25, 27.

Criminal Revision
No. 1003 of
1900.
December
6th.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. { NGA CHAN THA.
 { NGA SAN PE, AND
 { NGA PO SAN.

Mr. H. M. Lütter, Government Prosecutor, for the Crown.

Isolated act of conveying goods or passengers in a boat for hire within the limits of a ferry not punishable under Ferries Act.

The accused were charged under section 27 of the Ferries Act, 1898, with conveying goods for hire within the limits of a public ferry. It was admitted that on one occasion only they carried goods in a boat for hire within the ferry limits. It was not suggested that they were in the habit of doing so. The question was whether on these facts they have been rightly acquitted of an offence.

Held—that the accused were not guilty of an offence under section 27, as they contravened no provision of the Ferries Act.

Held also—that they were not guilty of an offence under section 25, as they did not ply a ferry boat.

THE accused were charged under section 27 of the Ferries Act, 1898, with conveying goods for hire within the limits of a public ferry. It may be taken as admitted that on one occasion only they carried goods in a boat for hire within the ferry limits. It is not suggested that they are in the habit of doing so. The question is whether on these facts they have been rightly acquitted of an offence.

Section 27 of the Ferries Act renders liable to a penalty any one who conveys for hire any goods, &c., "to or from any point within the limits assigned to a public ferry in contravention of the provisions hereinbefore contained." The difficult words to construe are the words "in contravention of the provisions hereinbefore contained." Section 15 forbids any person to ply a ferry boat for hire within the limits of a public ferry. But the penalty for contravention of this section is prescribed by section 25. It is clear, therefore, as pointed out in argument in this case, that section 27 cannot refer to section 15. It is suggested that "the provisions hereinbefore contained" mentioned in section 27 are the conditions and regulations made under section 14, and it may perhaps be added to the rules made under section 12. This view appears to be correct.

It must be held that the prohibition in section 27 of the conveyance of passengers, goods, &c., for hire is different from the prohibition in section 15 of the plying of a ferry-boat. A mere isolated act of conveying goods or passengers in a boat, even for hire, within the limits of a ferry does not amount to plying a ferry boat. To ply a ferry-boat must mean to make a practice of conveying goods or passengers for hire. The act with which the accused were charged is therefore not punishable under section 25 of the Ferries Act. Nor is it punish-

Ferries—12, 14, 15, 25, 27.

able under section 27 because it is not shown to have been in contravention of any of the previous provisions of the Act. If the words had been "otherwise than in accordance with the provisions hereinbefore contained," the case might have been different. But as the section stands, it does not seem to prohibit the mere act of conveying goods or passengers for hire in a public ferry, where such act does not come within the scope of section 15 and section 25.

The accused were therefore rightly acquitted.

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Forests—Rules 75 (1), 76.

Forest—Rules 75 (1), 76.

Criminal Revision

No. 918

1897.

October

25th.

Before G. D. Burgess, Esq., C.S.I.
KO SET TAUNG v. QUEEN-EMPRESS.

Mr. H. M. Lütter

Mr. H. N. Hirjee

Mr. C. G. S. Pillay

} for applicant.

Mr. R. S. Giles, Assistant Govern-
ment Advocate—for the Crown.Mr. R. C. F. Swinhoe—for com-
plainant.Forest Regulation—ss. 2 (4), 2 (8), 34, 51, 59, (4), 63—Rules 25, 35 (b), 41, 41 (a),
47, 71 (1), 72.“Forest produce”—Definition—‘Forest’ not defined—Interpretation of word
—Consequent presumption—Rough jade-stone found on ordinary route from Jade
mines presumed to be forest produce—Construction of rules.

REVISION.

THE applicant-accused was found to have concealed, among a consignment of India-rubber, a large quantity of jade, 39 pieces weighing 443 viss, the value of which was admittedly at least Rs. 12,000 and might be as much as Rs. 30,000, and despatched it from Mogaung in the Myitkyina district in two railway wagons, in which it was conveyed as far as Sagaing, where, in consequence of information that had been given, the wagons were opened and the jade-stone discovered; was convicted under Rules 41A* and 47* of the rules made under the Forest Regulation; and sentenced under the Rule 72† to rigorous imprisonment for six months, with a fine of Rs. 500 for the former offence and under Rule 71 (1)‡ to a further fine of Rs. 500 for the second offence, the jade-stone in respect of which the offences were found to have been committed being at the same time confiscated under section 51 of the Regulation.

An appeal to the Court of Session having been dismissed, the legality of the conviction was challenged in revision, on the grounds indicated in the following findings:—

Held—First, that the word ‘forest’ as used in the Regulation is to be understood as including everything that is not non-forest, that is to say, the whole of the country except what is specifically excluded under the provisions of the Forest Regulation or the Land and Revenue Regulation.

Held—Secondly, that on the evidence there was a presumption that the Jade Mines are situated in a ‘forest’ as so interpreted.

Held—Thirdly, that on the evidence and the foregoing findings and in the absence of anything to the contrary there was a reasonable presumption that the jade-stone in this case had come from the Jade Mines, and was consequently “forest produce.”

Held—Fourthly, that the proper construction of Rule 41A* as restricted by Rule 35 (b)* was that an offence was committed thereunder by the export without a pass of jade beyond the limits of the Myitkyina district by the railway route, wherever the jade-stone might have reached to, although the transport could not be interfered with in the manner allowed by the rule at any point further than those therein specified, and that the conviction under Rule 72† was therefore correct.

Held—Fifthly, that the confiscation of the jade-stone was warranted by section 51§ of the Regulation.

Held—Sixthly, that it was doubtful whether a breach of Rule 47* had been committed to justify a conviction and sentence under Rule 71‡.

Held—Seventhly, that the sentence under Rule 72† was not too severe for so extensive a smuggling operation.

[* *Vide* Revenue Department Notification No. 81 (Forests), dated 1st March 1899.

[† Rule 76 of the Rules under the Upper Burma Forest Regulation, 1898.]

[‡ Rule 75 (1) of the Rules under the Upper Burma Forest Regulation, 1898.]

[§ Section 54 of the Upper Burma Forest Regulation 1898.]

Forests—Rules 75 (1), 76.

Held—Eighthly, that the sentence under Rule 71* was uncalled for, whether the conviction was technically sound or not, and should be set aside.

Application for revision otherwise dismissed.

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IN the case out of which this application for revision has arisen the applicant-accused was convicted under Rules 41A† and 47† of the Rules made under the Upper Burma Forest Regulation and was sentenced to rigorous imprisonment for six months under Rule 72‡ with a fine of 500 rupees for the former offence, and to a further fine of 500 rupees for the second offence, the latter penalty being presumably inflicted under Rule 71 (1).*

The jade-stone in respect of which the offences were found to have been committed was at the same time confiscated under section 51§ of the Regulation.

An appeal was preferred to the Court of Session without success and the legality of the conviction is now challenged in revision. The leading facts are no longer in dispute, although the accused originally denied all knowledge of the jade.

These facts are that the accused concealed a large quantity of jade, 39 pieces weighing 443 viss, among a consignment of India-rubber and despatched it from Mogaung in the Myitkyina district in two railway wagons, in which it was conveyed on the railroad as far as Sagaing, where, in consequence of information that had been given, the wagons were opened and the jade-stone was discovered.

The value of the jade-stone is admitted to be at least Rs. 12,000 apparently, and it may be as much as Rs. 30,000 perhaps, so that, the royalty payable and not paid being 33½ per cent., the result of the smuggling, if duty was leviable, would be a respective gain and loss of between Rs. 4,000 and Rs. 10,000.

It is acknowledged on all hands that the case presents several points of no little difficulty, and it has been exhaustively and ingeniously argued both for the applicant and for the Crown.

Before going into particulars it may help to make matters clearer if a preliminary view is taken of the general position of affairs.

The State, as representative of the whole body of the people and guardian of their interests, claims to be, and is, in this country, that is, in Upper Burma, the ultimate owner or lord paramount of the soil, and this position it has declared and defined by two legislative enactments—the Land and Revenue Regulation and the Forest Regulation. Section 23 of the former describes under the name of State-land land to which the State has an absolute right, and among the kinds of land falling within this description is waste land. Section 27 again makes all lands other than State land liable to the payment of land revenue to Government, excepting only land belonging to the sites of religious and other buildings, and to the sites of towns and villages, and land exempted from such liability by the express terms of a grant made or continued by Government.

[*Rule 75 of the Rules under the Upper Burma Forest Regulation, 1898.]

[†*Vide* Revenue Department Notification No. 81 (Forests), dated 1st March 1899.]

[‡Rule 76 of the Rules under the Upper Burma Forest Regulation, 1898.]

[§Section 54 of the Upper Burma Regulation, 1898.]

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And section 31 provides that, saving such grant, "the right to all precious stones, mines, minerals, coal and earth-oil shall be deemed to belong to the Government.

The Regulation is meant primarily to deal with land which has been brought or is likely to be brought under cultivation or some such use. Land other than land of that kind is dealt with in the Forest Regulation, the preamble of which says: "Whereas it is expedient to provide a law relating to forests, forest produce and the duty leviable on timber in Upper Burma," and section 2 (8) of which lays down the following definition:—

"Land at the disposal of Government" means—

- (a) Land in respect of which no person has acquired a permanent, heritable and transferable right of use and occupation under any law for the time being in force;
- (b) land in respect of which no person has acquired any right created by grant or lease made or continued by, or on behalf of, the British Government."

Minerals are included by the Regulation under the term "forest produce," and thus rules relating to jade-stone are to be found among the rules made under the Regulation.

Nephrite or Jade-stone is understood to be a mineral of infrequent occurrence, but its value is almost entirely dependent upon the demand for it in China, where it is appreciated on account of peculiar qualities, of which Chinamen alone are supposed to be judges. It is therefore through the agency of Chinamen that Government, is accustomed to raise the revenue on jade-stone believed to be commensurate with the worth of the product. The measures for assessment of duty or royalty require delicate manipulation to avoid, on the one hand, killing the goose that lays the golden eggs, and, on the other, allowing the eggs to be carried off without a fair return for the public benefit.

The riddle to be solved has been how to give the farmer of the jade revenue a sufficient amount of control, and at the same time to restrain him from unduly pressing and harassing the jade-traders and driving them out of the market. The difficulty of accomplishing this feat is the source to a great extent of the difficulties which arise in the present case.

The rules which have been made on the subject apply, as they stand, to jade-stone without qualification, except that Rule 25 imposes the *ad valorem* royalty of 33½ per cent. only on jade-stone extracted in Upper Burma, and that Rule 41,* which prescribes the routes by which jade-stone may be moved, namely, routes passing through Mogaung, Myitkyina, Talaw or Kindat, exempts jade-stone imported from China and jade-stone on which duty has been paid.

Under the Regulation as it was originally enacted this would have been right enough, but it has been admitted by the learned Counsel

[* *Vide* Revenue Department Notification No. 81 (Forests), dated the 1st March 1899.

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for the Crown that the rules are not correctly expressed according to the present wording of the Regulation. Ko SET TAUNG,
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The former definition of forest produce was :—

2 “(4) ‘Forest produce’ includes trees, timber, plants, grass, peat, canes, creepers, reeds, leaves, moss, flowers, fruits, seeds, roots, juice, catechu, bark, caoutchouc, gum, wood-oil, resin, varnish, lac, honey, wax, surface-oil, and minerals (including limestone and laterite).”

The present definition made by Regulation VIII of 1890 is—

“(4) ‘Forest-produce’ includes—

- (a) the following, whether found in, or brought from, a forest or not, that is to say—
timber, charcoal, caoutchouc, catechu, wood-oil, resin, natural varnish, bark, lac, *mahua* flowers, and myrabolams; and
- (b) the following when found in, or brought from, a forest, that is to say—
 - (i) trees and leaves, flowers and fruits, and all other parts or produce not hereinbefore mentioned of trees ;
 - (ii) plants, not being trees (including grass, creepers, reeds and moss) and all parts or produce of such plants ;
 - (iii) wild animals and skins, tusks, horns, bones, silks, cocoons, honey and wax, and all other parts or produce of animals, and
 - (iv) peat, surface-oil, rock, and mineral (including limestone, laterite, mineral oils and all products of mines or quarries).”

The words “when found in or brought from a forest” are the same as those used in section 3 of the Forest Act of Lower Burma. It would appear that the definition of forest produce had been found too wide in respect of certain things, and that it had been deemed advisable to restrict it accordingly.

As to the things mentioned in clause (a) the definition is left as wide as ever, but the things specified in clause (b) are not to be treated as forest produce unless they are found in, or are brought from, a forest, and this limitation seems clearly necessary with regard to several at least of these things which might obviously be the product of cultivated land and private property.

The defence is that this distinction has been practically overlooked by the prosecution, although the attention of the Magistrate was drawn to the point. It is extraordinary that, as the Court of Appeal observes, there is no reference to this in the Magistrate’s proceedings. It was the Magistrate’s duty to call for all necessary evidence, and, if there has been any failure in this respect, the omission might be supplied now, though it is undesirable that the case should be further protracted after reaching the present stage.

The Court of Session considered that the jade-stone might rightly be held to be forest produce. It was clearly the intention of the rules that all jade-stone extracted in Upper Burma should be so considered, and it had long been the practice so to treat it. The farm of the

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royalty was sold without reservation, and it would be unreasonable to require the farmer to show that any particular piece of jade-stone had come from a forest before levying royalty on it. The Court referred to certain reports concerning the place of extraction of jade, and thought there was "no reasonable doubt that jade is ordinarily extracted from a place which is a forest in the common acceptation of the word."

If a man were to find a jade deposit in such a spot as his own garden in Mandalay, the fact would be specially within the knowledge of a person possessing a piece of jade from that source.

"If, therefore, it is alleged that the jade-stone in question is not 'forest produce, I think,'" says the Sessions Judge, "section 106 of the Evidence Act lays upon the person who alleges this the burden of proving it. It would obviously be impossible for the farmer of the royalties or for any Forest Officer to prove, in the great majority of cases, that any specified piece of jade was brought from a forest."

The objections to the conclusions arrived at are thus stated in the petition for revision:—

"(a) that the Lower Court should have found that the prosecution failed to prove that the jade-stones were 'forest-produce,' and the said conviction was therefore bad;

"(b) that the Lower Appellate Court erred in applying section 106 of the Evidence Act to the case, and in holding that the *onus* was on the defence to prove that the jade-stones were not 'forest-produce,' and that in the absence of such proof that the said jade-stones were presumed to be 'forest produce.'"

These objections do not cover the whole ground, for it is requisite for a conviction under Rule 47* that the jade-stone should not only be forest produce, but should be extracted in Upper Burma and should also be the produce of land at the disposal of the Government.

The first question for determination seems to be what is a 'forest.'

The word itself, though repeatedly used in the Regulation, is not defined, perhaps out of caution, for *omnis definitio in jure periculosa est*.

If the word 'forest' is used in ordinary conversation, the probability is that the idea raised in the mind of the hearer is that of a tract of land more or less covered with trees, but it seems uncertain whether this can be taken as the fixed popular sense of the word in the language, at least in the literary language.

Several dictionaries have been referred to in the course of the argument and various definitions are given.

It is natural to associate the presence of trees with a forest, but it is doubtful whether their presence is an essential feature.

WEBSTER.—"An extensive wood; a large tract of land covered with trees; in the United States a wood of active growth, or a tract of woodland which has never been cultivated."

[*Revenue Department Notification No. 81 (Forests), dated the 1st March 1899.]

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The New Forest in England is an example of a forest largely composed of tracts of bare heath and moorland, and in Scotland, as pointed out by the learned Assistant Government Advocate, a deer-forest has very little to show in the way of timber. It may also be remarked that in England the department which has the management of this portion of the Crown lands has the designation of Woods and Forests not Forests alone.

In one dictionary that I have looked at the only meaning given for forest is "Open ground for the king's game." Even in popular language, therefore, it would seem that 'forest' includes something more than a wooded tract of country.

But anyhow, apparently the word should not be constructed as a popular expression in the Forest Regulation, and nothing more.

As I have already indicated, the object of the Forest Regulation is to declare and define the rights of the State over all the land of the country in matters where the provisions of the Land and Revenue Regulation are insufficient.

It is an enactment of a technical character, and it is necessary to employ words in a technical sense.

It is a recognized rule of construction that their technical meaning must be given to technical expressions unless the contrary manifestly appears.

The general scope and intention of an enactment must also be considered, and the construction should be according to the intent.

As it is said, "In interpreting a statute it is to be borne in mind "at the outset that language is always used *secundum subjectam materiam*, and that it must therefore be understood in the sense "which best harmonizes with the subject matter."

The probability is that in framing such an enactment as the Forest Regulation regard would be had to the historical legal meaning of the word 'forest.' The word is derived from the Latin '*foris*' out of doors," and was

Webster's is an American Dictionary, but it goes on to give a second definition under the head of—

"(*English law*). A large extent or precinct of country, generally waste or woody, belonging to the sovereign, set apart for the keeping of game for his use, not enclosed, but distinguished by certain limits, and protected by certain laws, courts, and officers of its own—*Burrill*."

ANNANDALE—"An extensive wood or a large tract of land covered with trees; a tract of mingled woodland and open uncultivated ground; a district wholly or chiefly devoted to the purposes of the chase; a royal domain kept separate for such purposes, and subject to its own laws, courts, and officers."

"The savage woods and forests wide.—*Spenser's Faery Queen, Book III Canto VI-xvi*.

"For all the beasts of the forest are mine and so are the cattle upon a thousand hills." *Psalm L. 10*.

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WHARTON.—"Forest [*fr. foresta Ital.*] An incorporeal hereditament, being the right or franchise of keeping, for the purpose of venery and hunting, the wild beasts and fowls of forest, chase, park and warren (which means all animals pursued in field sports) in a certain territory or precinct of woody ground

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applied to open spaces. Professor Skeat says that in Brachet a quotation is given "*Foresti sest ubi sunt feræ non inclusæ; parcus locus ubi sunt feræ inclusæ.*"

An examination of the Regulation goes to show that the word forest is used in no limited sense.

A reserved forest is simply an area constructed out of land at the disposal of the Government, without requirement that such land should be of any particular description.

A village forest may be similarly formed, and there would be nothing to prevent its consisting merely of grass lands for pasturage.

Section 34* gives power to make rules concerning the use of forest produce of any land at the disposal of the Government, and among the things mentioned as forest produce are stone, lime, and grass, which according to the definition must be found in or brought from a forest.

The only place in which I discover the drawing of any distinction between forest and land at the disposal of Government is in section 59 (4)† which speaks of "any boundary of any forest or waste land," and possibly the words 'forest' and 'waste' may there be used as equivalent and not as distinct.

The effect of all this seems to be that the word 'forest' is to be understood as including everything that is not 'non-forest,' that is to say, the whole of the country except what is specially excluded. The whole country may be regarded as having been originally one huge forest, out of which have been carved comparatively small patches as the sites of towns and villages, and as the sites of religious and sacred buildings, and as ground for cultivation and so forth.

Such land has ceased to be forest for the most part, though, if it produces the things specified in clause (a), they are still forest produce. The things specified in clause (b), if produced on such land, are not forest produce, while if produced elsewhere they are.

and pasture set apart for the purpose, with laws and officers of its own, established for protection of the game."—*Manw. For Laws.*

* * * *

A forest is in general a royal possession, though it is capable of being vested in a subject. A forest is a right which the owner thereof (whether sovereign or subject) may have either in his own lands or the lands of another, differing from other incorporeal hereditaments, which are rights exercised over another's lands."

STROUD.—"By the grant of a forest in a man's own ground, not only the privilege but the land itself passes."—*Co. Litt. 5 b Touch 96.*

BLACKSTONE—"For we find that even among the Saxons there were woody and desert tracts called the forests, which, having never been disposed of in the first distribution of lands, were held therefore to belong to the Crown, and that these were filled with great plenty of game, which our royal sportsmen reserved for their own diversion on pain of a pecuniary forfeiture for such as interfered with their sovereign."—*Stephen, Vol. 1, Book III, Chapter XXIII, V. 2.*

* [Section 36 of the Upper Burma Forest Regulation, 1898.]

† [Section 62 (d) of the Upper Burma Forest Regulation, 1898.]

Forests—Rules 75 (1), 76.

Practically there would appear to be little or no difference between land at the disposal of Government and forest, except that the latter would include land constituted reserve or village forest which would cease to be classed under the former head.

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Upon this view of the matter the exact physical features of the Jade Mines are not of importance, though the papers and map that have been referred to indicate that they are situated in a wood as well as a forest.

In the article on jade in the Dictionary of the Economic Products of India referred to above, Mr. Warry's report is quoted as saying: "Considering the large area over which the jade-stone has at one time or another been discovered, the impracticable nature of the country covered, for the most part with thick jungle, &c."

These documents may be referred to under the provisions of section 57 of the Evidence Act concerning the Court taking judicial notice of—

9. "The geographical divisions of the world.

10. "The territories under the dominion of the British Crown.

"In all these cases and also in all matters of public history, * * * science * * *, the Court may resort for its aid to appropriate books or documents of reference."

Possibly section 35 might apply to some of the reports.

Section 36 would apply to the map.

But what is chiefly to be relied on probably is the *prima facie* presumption arising from the circumstances set out above that the country generally is forest and land at the disposal of Government and that land in which jade is found is likely to be part of such forest and Government land. The history of the jade monopoly under the Burmese Government points in the same direction. There is no suggestion that jade is a common product to be found elsewhere than in the one well-known locality of the Jade Mines, and in the face of the general presumption it would lie on the person alleging it to show private possession of a jade-yielding area.

This, however, only brings us to the point that, if the jade-stone in this case came from the Burma Jade territory, it was subject to the rules made under the Forest Regulation.

Did it come from there? There is no direct evidence that such was its origin. Are there materials upon which the Courts are justified in presuming that origin?

Section 114 of the Evidence Act says that "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business *in their relation to the facts of the particular case.*"

Now what are the facts here?

The jade was an exhibit before the Court and it is understood to be stones in the rough state.

Part of the stones were loaded in a boat at Kamaing; the rest were at Mogaung. These places as the map shows are on the road from

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the Jade Mines. Besides, the first witness says : " I have also traded " in jade-stone. I have bought the jade-stone at the Jade Mines " above Kamaing. I used to sell it at Mogaung." This then was the usual mode of exit. The rules require jade-stone to be brought to Mogaung among other places, and this was brought to Mogaung.

When it was removed from Mogaung the removal was effected surreptitiously, or, in other words, the jade was smuggled away.

It is admitted that some discount must be taken off the circumstances because of the error in the rules in mentioning jade-stone indiscriminately, but even after such allowance enough remains to raise a strong presumption. Unless the jade came from the Jade Mines, why should it thus travel to Kamaing and Mogaung at all.

There is nothing to suggest that there is any other territory yielding jade-stone in existence from which jade would be likely to find its way by this route.

Section 63* of the Regulation may also perhaps be taken into consideration. Under these circumstances, there is so cogent a presumption, that this jade-stone came from the Jade Mines and was forest produce under the rules that it must prevail in the absence of rebuttal, and there is no attempt at rebuttal.

Whether section 106 of the Evidence Act be applied or not, there was clearly a case for the defence to meet, and it was not met, and consequently the application fails on the first two grounds.

The third ground (c) is " that the Lower Courts should have held " that applicant was improperly convicted under the said Regulation " by virtue of Rule 35† of the said rules."

The portion of Rule 35† referred to is as follows :—

" Rule 41A applies only to the area covered by the highest rise of the Mogaung, Irrawaddy, and Chindwin rivers between the following limits :—

- " the Mogaung river from Mogaung to its mouth ;
- " the Irrawaddy river from the mouth of the Mogaung river to Katha ;
- " the Chindwin river from the mouth of the Mu river to Kindat ; and
- " the area occupied by the Burma State Railway from Mogaung to Naha-kaung."

Revenue Department Notification No. 329 (Forests), dated the 30th July 1896.

Rule 41A which was published in its present form in the same notification, says :—

" 41A. (1) No person shall export jade-stone beyond the limits of the Myit-kyina district without a pass granted by the person licensed in Form IX to levy the royalty on jade or by his agent or otherwise than in accordance with the conditions of such pass.

" (2) The pass shall be in the form of Appendix IXA.

" (3) Such pass shall be produced on the demand of any Forest or Police Officer, or for the inspection of the said licensee or his agent at Tapaw on the Mogaung river, or at any railway station between Mogaung and Nahakaung or at any place on the Irrawaddy river above Katha or at any place on the Chindwin river below Kindat.

" (4) Jade-stone for which a pass is not produced may be detained by any Forest or Police Officer."

* Section 66 of the Upper Burma Forest Regulation, 1898.

† Vide Revenue Department Notification No. 81 (Forests), dated the 1st March 1899.

Forests—Rules 75 (1), 76.

There has been much discussion as to the proper construction of these two rules taken together. The Magistrate considered that rule 35* obviously does not apply to clauses (1) and (2) of Rule 41A,* but to clauses (3) and (4). This reading would doubtless simplify matters, but Rule 35* itself contains no such limitation.

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The Court of Sessions has read Rule 35* as qualifying the whole of Rule 41A,* but has found that this does not affect the result in this particular case.

The rules are certainly not very easy to understand, and they would seem to afford much room for evasion.

But apparently their object is that there should be no interference on the part of the licensee with the transit of jade except on certain main routes and up to certain specified points along those routes. If jade is moved by other routes, or if it reaches a point beyond those specified, it cannot be meddled with in the manner provided by Rule 41A.*

But this is a different thing from what the contention for the defence amounts to, namely, that when the jade has got beyond the limits to which the rule extends that which would have been an offence otherwise is no offence in consequence.

The Court of Session has put the matter with clearness. It comes to this. If jade is found on one of the specified routes within the specified limits, the production of a pass for it can be required, and in the event of failure to produce if the jade can be detained.

If jade is found otherwise, it cannot be detained and no demand can be made for a pass, and, if there should be an attempt to prosecute, there are two difficulties in the way, one that of showing that there was no pass and the other that of proving by what route the jade was moved.

Even this seems a considerable concession to possible smugglers. To go further and suppose that it was intended that a smuggler should not be proceeded against at all, though a breach of the law could be established against him, merely because he had been successful in running the gauntlet, is more than the Courts can be expected to hold without the most convincing argument. Here there is no difficulty whatever about the proof. The jade was unquestionably exported beyond the limits of the Myitkyina District by the railway, one of the specified routes to which Rule 41A* extends, and the breach of the rule was clearly committed. It is immaterial what became of the jade itself. The rule does not require that it should be stopped within the defined limits in order to constitute an offence.

The application fails accordingly on this point also.

The next objection taken is, "that the Lower Courts should have held that the seizure of the jade-stones was illegal, and that the same should not be confiscated even if the conviction should hold good and the seizure thereof be held justifiable in law."

The question of the legality of the seizure need not be discussed. It is not one with which we are concerned in these proceedings.

* *Vide* Revenue Department Notification No. 81 (Forests), dated the 1st March, 1899.

Forests—Rules 75 (1), 76.

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The order for confiscation was legal under section 51 of the Regulation, which says—

“(1) When any person is convicted of a forest offence, *all* forest produce which is not the property of the Government and in respect of which such offence has been committed
* * * shall be liable, by order of the convicting Court, to confiscation.

“(2) Such confiscation may be in addition to any other punishment prescribed for such offence.”

All the requisite conditions were fulfilled here, and the Court does not seem to have exercised its discretion improperly. The effect is of course to enhance the punishment greatly, the loss to accused being equivalent to a fine of about Rs. 8,000 by his own reckoning and perhaps of Rs. 20,000 according to the computation of the prosecution, but that is merely in proportion to the magnitude of the transaction and the risk which accused deliberately chose to run.

There may possibly be reasons for remitting a portion of so heavy a penalty executively, but I find no sufficient ground for judicial interference in the matter.

The substantive sentence is also objected to as unduly severe. Under Rule 41A* the maximum punishment has been imposed, which it has been urged should not have been done in the case of a first offence of an unusual kind committed in breach of new and imperfectly understood rules.

But it is impossible to say that similar evasion of the law may not frequently have been practised before, and it is quite certain that, whatever difficulties there may be about the technicalities of the rules their essential substance is perfectly well-known to every Chinaman interested in the subject.

The present evasion of the law was deliberately and artfully planned, was carried out on an extensive scale, and involved a very large profit in the event of success. It is not only the jade licensee who is concerned, and it is of no consequence whether his conduct, which has been a good deal complained of, was correct and proper or not. The public interest is at stake as well. By smuggling of this sort the licensee is not merely defrauded, but the public revenue is made to suffer through the consequent reduction in the income from the license. In short the transaction was an extensive operation to cause wrongful gain on one side and wrongful loss on the other. Under such circumstances, the sentence under Rule 41A* cannot be deemed disproportionate to the offence, or unnecessarily severe for deterrent purposes, or otherwise excessive.

The accused has been further convicted of a breach of Rule 47* and sentenced to the maximum fine allowed by Rule 71†.

The sole remaining question in the case is as to the propriety of his additional conviction and penalty. At the hearing comparatively

* *Vide* Revenue Department Notification No. 81 (Forests), dated 1st March 1899.

† Rule 75 of the Rules under the Upper Burma Forest Regulation, 1898.

Forests—Rules 75, (1), 76.

little notice was taken of Rule 47,* attention being mostly devoted to the construction of the regulation in regard to forest produce and to the construction of Rule 41A.*

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But since I have been further examining the rules I am not thoroughly satisfied about this second charge.

The Magistrate says the accused "was bound to present his jade-stone at Mogaung to the licensee for examination and the realization of royalty, and in failing to do this he committed an offence quite distinct from the subsequent exporting of the jade;" but he has quoted no authority in support of his dictum. The alterations of some of the rules have been so numerous that it is far from easy to be quite sure how a particular rule stands at the present moment, and I must therefore speak with hesitation.

But, so far as I can make out, there appears to be no express provision requiring production of jade to the licensee.

The form of license in Appendix IX* says: "(2) Royalty shall be leviable only on jade * * * exported from Mogaung * * * . As long as jade * * * is kept at Mogaung, * * * it shall not be liable to royalty." The jade therefore is not liable to the levy of royalty till it is actually exported.

But an addition to the license form the licensee is required to value jade-stone within a period of two days and is allowed two days more within which to exercise his option of buying it or letting it go free (in the event of dispute presumably); and jade traders on their side are allowed, by an addition to Rule 25, a period of three days for the exercise of their option of paying the royalty demanded or offering the jade-stone to the licensee at his valuation; but these conditions apply apparently only after production which, according to the second clause of the license quoted above, may be deferred indefinitely.

*Rev. Dept. Notification No. 14 (Forests), dated 14th January 1896.

Same notification.

Rule 47,* which has been altered too, establishes revenue stations, Mogaung being among them, to which jade-stone "shall be taken by the persons in charge of it for examination, or for the realization of any royalty payable thereon, or for the purpose of affixing marks thereto."

Well, the jade-stone was so taken in this case.

There is nothing to show that the accused was in charge of any of the jade before it reached Mogaung, and he certainly was not in charge of the portion which came from Kamaing in the first witness's boat.

The smuggling of the jade subsequently out of Mogaung does not necessarily imply that any evasion of the rule was contemplated when it was first conveyed there. On the contrary, the opposite inference may be drawn, and I have drawn it in my argument above as to the character of the jade-stone indicated by the established circumstances of the case. It is thus doubtful whether a breach of Rule 47 has been committed by accused, or it is at least difficult to say that such

* *Vide* Revenue Department Notification No. 81 (Forests), dated 1st March 1899.

Forests—Rules 75 (1), 76

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breach was committed at any time before the jade-stone left Mogaung in the railway wagons.

In any case the breach would be virtually nothing more than a part of the offence of illicit export for which accused has already been punished under Rule 41A.* and it was superfluous and incorrect thus to pile a charge under one rule on top of that under another so as to cover the same thing twice over.

Even if two separate offences were technically committed, it would be inexpedient to punish substantially for both.

There is a certain appearance of vindictiveness in adding the full pecuniary penalty under Rule 47,* when the maximum punishment has already been imposed under Rule 41A* and a mulct of many thousand rupees has been inflicted by the confiscation of the jade.

I feel so little confidence that something may not have been overlooked among the embarrassing exuberance of rules that I am indisposed to interfere with the conviction under Rule 47,* but I am satisfied that the addition of the sentence under that rule is uncalled for and is inexpedient, and I therefore set it aside. This fine of Rs. 500 will have to be refunded.

In all other respects the application for revision stands dismissed.

* [Vide Revenue Department Notification No. 81 (Forests), dated 1st March 1899.]

Gambling—4, 12.

Gambling—4, 12.

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS *v.* NGA SHWE ZIN AND THREE OTHERS.

Mr. H. M. Lütter, Government Prosecutor,—for the Crown.

REVISION.

Criminal Revision
No 989.
1897.
January
5th
1889.

Public Gambling Act, 1867, ss. 3, 4, 12, 13.—The game of gōnnyin is one of pure skill and does not therefore come under the provisions of the law against Public gaming.*

* The accused were acquitted under sections 3 and 4† of the Public Gambling Act (III of 1867) of a charge of committing a breach of the law by playing the game of *gōnnyin*, and the Magistrate submitted the case to the District Magistrate, by whom it was referred to the High Court, which passed the following orders.

THIS appears to be in some respects a good test case, but as the accused have been acquitted, there ought to be either an appeal, or a motion by the Government Prosecutor. The latter would probably suffice, as there seems to be no question of fact involved.

Before such action is taken, however, the District Magistrate should satisfy himself on two points.

In the first place, was the game a game of mere skill or not? and, in the second if it was, would it come within the provisions of sections 3 and 4† of the Public Gambling Act of 1867? Section 13† of that Act expressly protects such games.

So far as I have ever seen the game of *gōnnyin* played, it is a game of skill, and indeed one witness so describes it. On the other hand, however, the ring used is spoken of as a teetotum. If it were so used, then the *gōnnyin* seeds would probably be counters.

If it is a game of skill, is it any use raising the further question?

In England skittles or ninepins, which *gōnnyin* resembles in character, is, I believe, played freely without reference to the law against gambling.

For the District Magistrate's assistance a proof of judgment about to appear among the Printed Judgments of the last quarter is appended.‡

January 5th.—Heard Mr. Lütter, Government Prosecutor, for the Crown.

Read proceedings of District Magistrate.

The statements concerning the nature of the game of *gonnyin* which the District Magistrate has recorded entirely confirm the view expressed in my previous order that the game is one of pure skill.

There is no more element of luck about it than there is about anything else in the world.

The game is of the same class as Skittles, Aunt Sally, Cocanut-shy, and such like, and there is no more reason for stopping it than there is for meddling with any of those amusements. People must have some kind of recreation, and they could not find one much more innocent than that under discussion.

* [Sections 12, 11, 4, 10, Gambling Act, 1899.]

† [Sections 12 and 11, Gambling Act, 1899.]

‡ [Section 10, Gambling Act, 1899.]

§ Not reprinted.

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The Dictionary (Mr. Stevenson's) says of *gônnyin*.

"A kind of creeper (*Entada pursætha*); the seeds of the said creeper used by children in play."

The Gambling Act in sections 12* and 13 exempts from the operation of its provisions "any game of mere skill wherever played," and consequently this being a game of skill the acquittal of the accused who were playing it was perfectly correct.

The Gambling Act is about to be amended and re-enacted, and if it is desired by the legislature to prevent such pastimes as *gônnyin*, it* can be done upon this opportunity, but I cannot think that any such enactment is likely to be passed.

The papers may be returned.

Evidence taken as to nature of game of gônnyin.

I have seen the form of play in which instruments similar to those now shown me are used.

"The ground is levelled, the seeds, one for each competitor, are placed inside a circle drawn on the ground. The competitors then move some paces away from the circle and shoot the ring at the standing seeds with their fingers.

"One person has charge or control of the game, and usually sells the seeds to those who intend to take part in the game. He then collects the value fixed on each seed from the competitors who are paid according to the value fixed for each seed they knock out of the circle, the person controlling the game keeping any balance.

"Thus, if there are six competitors there will be six seeds in the circle; and, if the value is fixed at an anna and three are knocked out, the competitors receive three annas and the conductor three annas. The above is how I understood it to be played when I watched the game."

* * * * *

"The game played with the *gônnyin* seeds and horn ring is as follows:—

"The conductor sets up eight seeds on end with the edge pointing to the competitors.

"A competitor then takes up his position some paces away and shoots the ring with his fingers, which causes it to spin and it moves as it spins (like a top) and knocks down any seeds with which it comes into contact.

"Sets of competitors play and put generally two seeds on to the pool; they then each have a turn, and the one that knocks down the most takes the pool.

"The conductor does not necessarily get a commission, but sells the seed to the competitors at 12 for an anna and he re-purchases them at 20 for an anna.

"Players are not obliged to bring their own seeds."

* * * * *

"The game of *Gwin Taung To* is played by placing the seeds on end and end-ways to the players, and then a horn ring is spun at them from a distance.

"The players place an equal number of seeds which they purchase from the conductor in a pool, and the one who knocks down most of the standing seeds takes the pool.

"The seeds are purchased from the conductor, who purchases them from the winners cheaper than he sells them.

"A good deal of betting takes place between the players as to the number of seeds that each will knock down. The conductor on the commencement of each fresh game takes one seed from the pool as commission.

* [Section 4, Gambling Act, 1899.]

Gambling—5, 10.

Gambling—5, 10.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. NGA SU AND OTHERS.

*Criminal Revision
No. 475
of 1900.
May
17th.*

Gambling within view of a police officer in public place.—Legality of subsequent arrest.

The accused are said to have been gambling in a place to which the public have access and within the view of a police officer. Two of them were arrested on the spot and one of these has been convicted. The others escaped for the moment, but their names were obtained and they were arrested afterwards. The Magistrate acquitted all the accused who were not arrested on the spot on the ground that the arrests were illegal. The District Magistrate is of opinion that the arrests were not illegal.

Pointed out—that when accused persons are brought before a Criminal Court it is the duty of the Court to try them for the offences with which they are charged and any irregularity in the arrest is not in itself a ground for acquitting them.

Held—that if a police officer sees a man gambling in a place to which the public have access, he himself may arrest him then and there, or, if he escapes for the time, subsequently.

Held also—that it would not be legal for a police officer who should come upon a number of persons gambling subsequently to arrest persons reported to have been present but whom he himself did not see or recognize.

References:—

- 1, U. B. R., 1897-01, page 182.
- 2, ————1892-96, page 2.
- 1, ————page 123.
- 1, ————153.
- 1, ————317.
- P. J. L. B., page 256.

THE accused are said to have been playing pitch-and-toss for money in a place to which the public have access and within the view of a police officer. Two of them were arrested on the spot and one of these has been convicted. The others escaped for the moment, but were arrested afterwards. It is not clear that they were arrested by the officer within whose view they were playing or that the said officer recognized them and arrested or had them arrested of his own knowledge. It seems rather that the police officer saw a number of persons gambling and obtained from others the names of those who ran away. The Magistrate acquitted all the accused who were not arrested on the spot on the ground that the arrests were illegal. The District Magistrate is of opinion that the arrests were not illegal and that the accused should not have been acquitted on this ground.

In the first place it may be remarked that the illegality of the arrest was not a good ground for the acquittal of the accused. If persons are illegally arrested, they have their remedy both in the Civil and in the Criminal Courts. But when accused persons are brought before a Criminal Court it is the duty of the Court to try

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them for the offences with which they may be charged; and any irregularity in the arrest is not in itself a ground for acquitting them. This was explicitly held in the case of *Ah Hin*.^{*} The same view is indicated in *Queen-Empress v. Pa Twe Wa*,[†] *Queen-Empress v. Nga Kan*,[‡] *Saya Kye v. Queen-Empress*,[§] and *S. R. M. M. Perianen Chetty v. Queen-Empress*.||

As regards the question whether the arrests in this case were illegal, there does not seem to be any distinct ruling in Upper Burma. Under section 13 of the Public Gambling Act, 1867, it was ruled in Lower Burma ¶ that the section gave "no authority to the police to "apprehend without warrant any person committing any of the acts "made punishable under that section except at the time and place "where such act was committed." Section 10 of Act III of 1867 authorized a police officer to apprehend without warrant any person found playing for money, &c. Section 5 of the Burma Gambling Act, 1899, authorizes a police officer to arrest without warrant any person who, in any street, &c., and within view of the police officer, plays for money, &c. The new Act does not seem to have made any change in the law in respect of the power of the police to arrest without warrant. The law has been made more clear. If a police officer sees people playing for money in a street, &c., as described in section 5, he may arrest them without warrant. He may not arrest without warrant persons who are reported to him as having gambled. But if he sees people gambling in a street, thoroughfare, or place to which the public has access, I do not think there is anything to prevent him from pursuing and arresting them if they run away, or from arresting them later should they succeed in evading arrest at the time. Apparently he must arrest them himself and cannot depute another officer not present when the gambling was seen, to effect the arrests. I can find nothing in the section to require the arrest to be made on the spot or to prevent subsequent arrests. I must therefore respectfully dissent from the Lower Burma Ruling cited above. So far as I can judge, the law is that if a police officer sees a man gambling in a public place (to use a convenient abbreviation) he himself may arrest him there and then or, if he escapes for the time, subsequently. But I think it would not be legal for a police officer, who should come upon a number of persons gambling, subsequently to arrest persons reported to him to have been present but whom he himself did not see or recognize. In the latter case, the proper course would be to apply to the Court for summonses. Magistrates will be guided by these remarks.

The case under reference does not seem to be of sufficient importance to render it necessary to call upon the accused to show cause against a re-trial.

* Page 182.

† 1, U. B. R., 1892—96, page 2.

‡ 1, U. B. R., 1892—96, page 123.

§ 1, U. B. R., 1892—96, page 153.

|| 1, U. B. R., 1892—96, page 317.

¶ P. J. L. B., 256.

Gambling—6.

Gambling 6.

Before H. Thirkell White, Esq., G.I.E.

NGA PYI AND FIVE OTHERS v. QUEEN-EMPRESS.

Mr. W. Calogreedy—for the applicants. | Mr. H. M. Lütter—for the Crown.

Gambling 6—Warrant under—issue of—Presumption under section 7.

The Subdivisional Magistrate issued a warrant under section 6 of the Gambling Act, 1899, for the search of the accused's house. The only ground of conviction was the presumption under section 7 of the Act.

Held—that before the presumption can be drawn under section 7, it must be shown that the search was made in strict accordance with the provision of section 6. The warrant must be issued after the information has been recorded and the provisions of section 103, Code of Criminal Procedure, must be observed in the search.

Held—that as a matter of practice the information and grounds of belief recorded under section 6 should always be filed with the record of the trial.

THE accused were convicted on the 25th May 1899 of offences under section 3 and section 4 of Act III of 1867,* the said offences having been committed on the 24th of the same month.

As the Burma Gambling Act came into force on 22nd April 1899, the trial should have been held under that Act. I should not consider the entry of sections 3 and 4 of the Act of 1867,* instead of the corresponding sections of the Act of 1899, an error fatal to the validity of the proceedings; and I should not on that account interfere with the convictions and sentences in this case. The case must be considered as having been initiated and dealt with under the Gambling Act of 1899.

The Subdivisional Magistrate issued a warrant for entry into the house of Nga Pyi. The house was entered and the accused were all found in it. Cards and other instruments of gaming were found in the house; but no gambling was seen by the police officers who entered the house. There is no other evidence against the accused. The convictions are based entirely on the presumption drawn under section 7 of the Act. It is necessary therefore to consider whether the provisions of section 6 of the Act were duly observed.

In the first place, it is necessary that the warrant of entry should be properly issued. It must have been issued by the Magistrate (or District Superintendent of Police) on belief based on credible information. The substance of the information and the ground of the belief must be recorded in writing. Obviously they must be produced at the trial, was without them the trying Magistrate and Courts of Appeal and Revision have no means of knowing whether the warrant was duly issued. They should invariably be filed with the record of the trial. The protection afforded by the second sub-section of section 6 will obviate any ill-effects which might otherwise be occasioned by this requirement. In the present case there is nothing to show that the Magistrate issued the warrant of entry in accordance with the provisions of the section.

Criminal Revision
No. 610,
1899.
September
1st.

* [Sections 12 and 11, Gambling Act, 1899.]

Gambling—6.

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v.
NGA PYI.

In the next place, the search must be made in accordance with the provisions of section 103 of the Code of Criminal Procedure. In the present case it is clear from the evidence that this rule was disregarded. Only police officers were present at the search. There were no independent witnesses; and no list of things seized was made. Even if the warrant had been duly issued, the failure to comply with subsection (3) of section 6 would be a fatal irregularity. The search or entry cannot be said to have been made under the provisions of that section, when an imperative requirement of the section is disregarded.

The house not having been entered under the provisions of section 6, it is obvious that the presumption created by section 7 does not arise. This would not necessarily involve the acquittal of the accused as the offences charged might be proved by evidence. But in the present case, there was no other evidence. The convictions cannot therefore be sustained.

I observe also that one of the accused, who was convicted of keeping a common gaming house, wished to produce evidence that he was not the owner or occupier of the house, and that the Magistrate declined to allow him to do so. He should obviously have been allowed to produce evidence on this point.

The convictions and sentences are reversed. The fines will be refunded and the bail and recognizance bonds of Nga Pyi will be cancelled.

 Gambling—10.

 Gambling—10.

Before H. Thirkell White, Esq., C.J.E.

QUEEN-EMPRESS v. NGA SAN YE AND FOUR OTHERS.

Public Gambling Act, 1867, 13—Gambling in a zayat—Zayat is a "place to which the public have access."*

Criminal Revision

No. 276,

1898.

April

27th.

The Sessions Judge considered it doubtful whether the conviction was correct, because the accused were found gambling in a *zayat*.

Held—that a *zayat* must be regarded as a "place to which the public have access," and that persons found gaming in it are liable to prosecution under section 13 of Act III of 1867.*

The learned Sessions Judge has sent for revision a case in which certain persons were found by the police gaming with cards in a *zayat*. They were convicted under section 13 of Act III of 1867.* The Session Judge remarks:—

"I am very doubtful whether the conviction in this case is correct. The accused were discovered in the act of playing cards for money in a *zayat* or rest-house; the police, after sending on a spy to watch the gambling, themselves entered the rest-house and arrested five persons who were playing a game of *komi*. I hardly think that a *zayat* can be considered 'a place to which the public have access within the meaning of section 13 * of Gambling Act.' I can find no ruling on the point, but I certainly think that a *zayat* should be treated as a house and that persons who are owners or occupiers of *zayats* and allow such houses to be used as a common gaming-houses, and persons who visit such places for the purpose of gambling, should be prosecuted under sections 3 and 4† of the Act, and not under section 13.*"

In Mr. Stevenson's Dictionary a *zayat* is defined as "a building erected for public accommodation, a rest-house." I think that ordinarily a *zayat* must be regarded as a "place to which the public have access," and that persons found gaming in a *zayat* are liable to prosecution under section 13 of Act III of 1867.*

Interference with the prosecutions in the case under reference is therefore not required.

* [Section 10, Gambling Act, 1899].

† [Sections 12 and 11, Gambling Act, 1899].

 Gambling—10, 11.

 Gambling—10, 11.

Before G. W. Shaw, Esq.

KING-EMPEROR *v.* NGA PO SO AND AUNG BAN.

Criminal Revision
No. 394 of 1901.
June
5th.

The accused were convicted under section 11 of the Gambling Act for playing cards in a *zayat* in the compound of a monastery.

Held,—that gambling in a *zayat* in the compound of a monastery was an offence punishable under section 10 of the Gambling Act, as the *zayat* was a place to which the public had access.

Reference :—1, U. B. R., 1897—1901, page 215.

The accused were convicted under section 11, Gambling Act, and sentenced, Po So to a fine of Rs. 35, or, in default, 15 days' rigorous imprisonment, he having been convicted before under the Gambling Act and fined Rs. 30 (three years before), and Aung Ban to a fine of Rs. 10 or seven days' rigorous imprisonment. Their offence was playing cards in a *zayat* in the compound of a monastery. In *Queen-Empress v. San Ye and others** it was held that a *zayat* is a place to which the public have access and the fact that it is in the compound of a monastery does not alter the character of it.

The convictions in the present case should have been under section 10. I alter the convictions to convictions under section 10, Gambling Act, and reduce the fine in the case of Po So to one of Rs. 10. As the fines have been paid it is unnecessary to pass a sentence of imprisonment in default.

The excess fine will be refunded.

* Page 215.

Gambling—10, 11, 12.

Gambling—10, 11, 12.

Before G. W. Shaw, Esq.

NGA PO TUN, NGA LAW, NGA PO SAN *v.* KING-EMPEROR.

Gambling in a threshing-floor punishable under section 10, being a place to which the public have access.

*Criminal Revision
No. 824 of
1901.
October
10th.*

The three applicants along with 50 odd others played for money, pitch and toss, and other games, with instruments of gaming in a threshing-floor. When the police appeared they all dispersed, but information was obtained of the identity of the persons concerned and proceedings were instituted on complaint. The three applicants were charged under section 12 and the rest under section 11 of the Gambling Act. Evidence was taken to show that the three accused were the sons-in-law of the headman and for three months past had been carrying on different kinds of gambling for their own profit. They were charged and sentenced to three months' rigorous imprisonment under section 12, Gambling Act.

Held,—that what the applicants were charged with was playing in a threshing-floor, in other words a place to which the public had access. The plain and obvious course was to charge them under section 10 of the Gambling Act, and the Magistrate was not justified in assuming that the threshing-floor was a common gaming house.

THE above-named applicants played for money, pitch and toss, and other games, with instruments of gaming in a threshing-floor at Thakuttaw on the 5th September last along with 50 odd other persons. When the police appeared they all dispersed, but information was obtained of the identity of the persons concerned and proceedings were instituted on complaint. The three applicants were charged under section 12 and the rest under section 11 of the Act and all pleaded guilty. The three applicants were sentenced under section 12 to three months' rigorous imprisonment each.

Evidence was taken to show that they were the sons-in-law of the headman and for three months past had been carrying on different kinds of gambling for their own profit.

What they were charged with, however, was playing, etc., on the 5th September and that was in a threshing-floor, in other words a place to which the public had access.

The plain and obvious course was to charge them under section 10 and the Magistrate was not justified in assuming that the threshing-floor was a common gaming house.

As near relatives of the headman and the promoters and organizers of the gambling the three applicants no doubt deserved a heavier punishment than the others.

The limit of punishment under section 10 is a fine of Rs. 50 or imprisonment for one month.

I alter the convictions of the three applicants to convictions under section 10, and reduce the sentences in each case to one of imprisonment for one month.

Gambling—II.

Gambling—II.

Criminal Revision
No. 425 of
1900.
June,
4th.

Before H. Thirkell White, Esq., C.J.E.

NGA PA SI, NGA MAUNG GYI, NGA PO MAUNG, NGA YA BAW,
v. QUEEN-EMPRESS.

Mr. C. G. S. Pillay—for applicants. | Mr. H. N. Hirjee—for the Crown.

Gambling—Evidence of informer—Corroboration.

The applicant was convicted under section 11 of the Burma Gambling Act, 1899, of gambling in a common gaming house. The only evidence against the accused was the mere word of an informer corroborated solely by the bald statements of his near relations and by no other evidence direct or circumstantial.

Held,—that convictions for illegal gambling cannot safely be had on the mere word of an informer corroborated solely by the bald statements of his near relations and by no other evidence direct or circumstantial.

THE applicant has been convicted under section 11 of the Burma Gambling Act, 1899, of playing in a common gaming house.

The facts and circumstances are as follows. On 15th April 1900, Maung Hlut, a villager of Sinde, lodged a complaint before the Sub-divisional Magistrate that on the 10th of that month in the house of the applicant, who is the village headman, the applicant and four others played dominoes for money and that one of the four, Pa Si, received Rs. 1-8-0 as commission. When preferring this complaint Maung Hlut was accompanied by one of the accused, Nga Yun. Process was issued and the accused were called upon to show cause why they should not be convicted. Nga Yun admitted the offence and implicated the other accused. The other accused denied having played for money, but admitted that they played for love. Maung Hlut, examined as a witness, said that at about 10 P.M. on the night in question, he went and peeped in at the gamblers from near the steps. He had commissioned Nga Yun (accused) to tell him when there was any gambling; and he went with Nga Yun and had a look. From this peep, how long continued is not stated, Maung Hlut was able to say that the accused were all playing for money, and that Pa Si took commission to the amount of Rs. 1-4-0 or Rs. 1-8-0. He said that San Baw, Po Thaik, and Po Mya were present near the gambling ring. The remaining witnesses were these three men who are Maung Hlut's nephews. San Baw said that he saw the accused gambling for about the time it would take to boil a pot of rice. This was at 7 o'clock in the evening. When he came down from the house he saw Nga Hlut near the steps. He said that the gambling was for money and that Pa Si took commission, perhaps Re. 1 or Rs. 1-4-0. Po Thaik went to the thugyi's house at sunset on that date and found the accused gambling, and Pa Si taking commission about 2 to 4 annas. He looked on at the game for about the time it takes to boil two pots of rice. He did not see Nga Hlut. Shwe Mya also

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went at sunset and looked on for a short time and saw much the same as Po Thaik.

For the defence, the brother-in-law of the headman and a youth who slept in the house on the night in question, were called to prove that the accused played dominoes for love only.

The Subdivisional Magistrate, on this evidence and on the admission of Nga Yun, convicted the accused. He made no reference to the fact that Nga Hlut was the informer, and the other witnesses his nephews; but he was careful to point out the relationship of one of the defence witnesses to accused Maung Gyi and he noted in respect of the other witness for the defence that he was clerk to a friend of Maung Gyi. This may be true, but it does not appear on the record. The Magistrate took no notice of the discrepancies as to time in the evidence of the witnesses for the prosecution. When every allowance is made for vagueness of ideas of time, Nga Hlut's statement that when he peeped in at 10 P. M., his three nephews were present, can hardly be reconciled with the statements of Po Thaik and Swe Mya, who were there for a short time at sunset.

The crucial point in the case is whether Pa Si took commission. All the witnesses say that he did so. But they gave no particulars and their evidence on the point seems of little value.

Taking into consideration the fact that Nga Hlut was an informer, no doubt expectant of reward, which was indeed granted him, that the witnesses are his near relations, that the evidence is inconsistent in a material point and not specially credible on the face of it, I am of opinion that the conviction of Maung Gyi in this case is not sustainable. No man would be safe from prosecution for illegal gambling if convictions could be had on the mere word of an informer corroborated solely by the bald statements of his near relations and by no other evidence direct or circumstantial. The admission of the accused, Nga Yun, who was in league with the informer, cannot be considered as materially corroborating the evidence for the prosecution.

The convictions of Pa Si, Maung Gyi, Po Maung, and Ya Baw are reversed and it is ordered that the fines, if paid, be refunded to them. The conviction of Nga Yun must stand, as he admitted the offence. The order granting a reward to Nga Hlut is set aside; if any reward had been paid it must be refunded.

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v.

QUEEN-EMPRESS.

Gambling—11, 12.

Gambling—11, 12.

Criminal Revision
No. 147 of
1900.
March,
6th.

Before Thirkell White, Esq., C.J.E.

QUEEN-EMPRESS *v.* NGA PO LIN, NGA TUN LIN, NGA PO KAN,
 NGA PO TAIK, NGA PO CHIT, AND NGA SHAN GYI.

Imprisonment in default of payment of a fine under section 11 or section 12 of the Gambling Act, 1899, is limited to one-fourth of the maximum term of imprisonment for the offence.

Reference:—1, U. B. R., 1897—1901, page 221.

THE Magistrate seems to have discovered that he had passed an illegal order of imprisonment in default of payment of fine and to have corrected his judgment. If, as seems clear, he did this after signing and delivering the judgment; his action was irregular and illegal.

The attention of the Magistrate is drawn to the ruling of this Court in *Queen-Empress v. Tun Hla*,* which declares that section 65 of the Indian Penal Code applies to offences punishable with imprisonment or fine. The ruling is applicable to sentences of imprisonment, in default of fine under sections 11 and 12 of the Gambling Act, 1899.

* Page 221.

Gambling—12.

Gambling—12.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. NGA TUN HLA.

Mr. H. M. Litter, Government Prosecutor—for the Crown.

Public Gambling Act, 1867, s. 3—Imprisonment—Limit of—in default of payment of fine under—.*

*Criminal Revision
No. 385 of
1898.
July
29th.*

The question in this case is whether section 65 of the Indian Penal Code applies to imprisonment in default of payment of a fine under section 3 of Act III of 1867.*

Held—that section 65 of the Indian Penal Code is intended to apply to offences punishable with imprisonment *or* fine, and that imprisonment in default of the payment of a fine under section 3 of Act III of 1867* must be limited to one-fourth of the maximum term of imprisonment awarded for the offence.

References :—

Para. 122, U.B.C.M.

1, U. B. R. 1892—96, page 93.

P. J. L. B. 1897, page 385.

Maxwell on Statutes, pages 42—374.

THE question which has been raised and argued in this case is whether section 65 of the Indian Penal Code applies to imprisonment in default of payment of a fine under section 3 of Act III of 1867.* The penalties imposed by the last-quoted section are fine not exceeding Rs. 200, or imprisonment for a term not exceeding three months; a sentence of imprisonment and fine cannot be passed. The provisions of sections 63 to 70 of the Indian Penal Code apply to fines imposed under Act III of 1867,* in virtue of section 25 of the General Clauses Act, 1897. Section 64 of the Penal Code, as amended by Acts VIII of 1882 and X of 1886, distinguishes between offences punishable (1) with imprisonment as well as fine, (2) with imprisonment or fine, and (3) with fine only. It seems at first sight, therefore, that the expression "imprisonment as well as fine" is not inclusive of the term "imprisonment or fine." If this is so, section 65 of the Penal Code, which limits the term of imprisonment in default of payment of a fine, "if the offence be punishable with imprisonment as well as fine," does not govern the case of an offence punishable with "imprisonment or fine" but not with both. This is the view which has been taken on more than one occasion by this Court. In Circular No. 4 of 1890,† it is said: "section 65 is not applicable to offences punishable with imprisonment or fine, *e.g.*, offences under sections 3 and 4 of the Gambling Act, 1867.‡ In such cases, therefore, there is no restriction upon a Magistrate's power of imprisonment in default of payment of a fine, except that imposed by section 32, Code of Criminal Procedure."

In *Queen-Empress v. Po Tu*§ the same opinion was expressed :—

"Section 65 applies where an offence is punishable, not with imprisonment, *or* fine, but with imprisonment *as well as* fine."

[* Section 12, Gambling Act, 1899.]

[† Obsolete, *vide* para. 122, U. B. C. M.]

[‡ Sections 12 and 11, Gambling Act, 1899.]

[§ 1, U. B. R., 1892—96, page 93.]

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I should be content to follow these rulings without question, but for the reasons noted below. In Lower Burma, the contrary view has been held. In the judgment reported in Printed Judgment, 1897, page 385, it is said:—

“As the maximum term of imprisonment under section 4 * of the Public Gambling Act is one month, the accused could not, under section 65, Indian Penal Code, be sentenced to more than one week's imprisonment in default of payment of fine. Section 65 has been made applicable to fines imposed under the Public Gambling Act, 1867, by section 25 of the General Clauses Act, 1897.”

The terms of section 37 of the Police Act, 1861, as amended by Act VIII of 1895, seem to support the view taken in the ruling last quoted. That section enacts that, notwithstanding anything in section 65 of the Indian Penal Code, a certain term of imprisonment in default of payment of a fine under section 34 of the Act shall be legal. Now offences under section 34 of the Police Act are punishable with imprisonment *or* fine, not with both. If, therefore, section 65 of the Penal Code, does not apply to offences punishable only with imprisonment *or* fine, the proviso to section 37 of the Police Act seems to be superfluous. If, on the other hand, section 65 does apply to those offences, the distinction in section 64 of the Penal Code, between offences “punishable with imprisonment as well as fine” and offences “punishable with imprisonment *or* fine” seems unnecessary.

* * * *

It is further to be noted that, unless section 65 of the Indian Penal Code applies to offences punishable with imprisonment *or* fine, there is no section which can apply to those offences so far as regards the limitation of imprisonment in default of payment of fine. The somewhat anomalous result would ensue under the ruling in Circular 4 of 1890 † that a Magistrate of the first class passing sentence under section 3 or section 4 of Act III of 1867 ‡ might impose a sentence of two years' imprisonment in default of payment of fine.

Further, there is the undoubted fact that, in enacting the proviso to section 37 of the Police Act, the Legislature held that section 65 of the Indian Penal Code would, if not excluded, apply to cases under section 34 of the Police Act. If that is so, then section 65, Indian Penal Code, must apply to cases under section 3 of Act III of 1867.§ It is a recognized rule of construction that a later Act may furnish a legislative interpretation of an earlier Act (Maxwell on the interpretation of Statutes, page 42), or as is said in another passage:—

“Where it is gathered from a later Act that the Legislature attached a certain meaning to certain words in an earlier cognate one, this would be taken as a legislative declaration of its meaning there.” (*Ibid*, page 374.)

This canon of construction appears to meet the present case precisely.

On full consideration, I am of opinion that section 65 of the Indian Penal Code is intended to apply to offences punishable with imprisonment *or* fine and that imprisonment in default of the payment of a fine

[* Section 11, Gambling Act, 1899.]

[† Obsolete, *vide* para. 122, U.B.C.M.]

[‡ Sections 12 and 11, Gambling Act, 1899.]

[§ Section 12, Gambling Act, 1899.]

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under section 3 of Act III of 1867* must be limited to one-fourth of the maximum term of imprisonment awarded for the offence. The rulings to the contrary in Circular 4 of 1890† and *Queen-Empress v. Po Tu*‡ are therefore superseded.

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NGA TUN HLA.

In the concrete case out of which this reference arises the fines were paid. Formal amendment of the sentences is therefore unnecessary.

* [Section 12, Gambling Act, 1899.]

† [Obsolete, *vide* para. 122, U.B.C.M.]

‡ [1, U.B.R., 1892—96, page 93.]

Gambling—12, 14, 9.

Criminal Revision
1067 of
1900.
December
11th.

Gambling—12, 14, 9.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. NGA YA PO.

Offences under clauses (a) and (d), section 12, Gambling Act, may be separately punished—Omission of Magistrate to comply with section 191, Criminal Procedure Code, invalidates a trial—Magistrate precluded by section 14, Gambling Act, from taking cognizance of offence under section 12, committed more than a month before receipt of report—to allow gambling in one's house or to lend money gambling is not per se an offence—Evidence of accomplices absolved under section 9, Gambling Act, not invested with any special value.

The accused was convicted of using his house as a common gaming-house and of advancing money to persons who frequented his house for gaming and was sentenced separately under clause (a) and clause (d) of section 12 of the Gambling Act. The Magistrate took cognizance of the offence on a report by a Township Judge under section 190, sub-section (1), clause (c), of the Code of Criminal Procedure, but did not inform the accused that under section 191 of the Code he was entitled to be tried by another Court. The Township Judge's report was received by the Subdivisional Magistrate on 30th May 1900. Yet in stating the particulars of the offence to the accused the Magistrate included reference to acts committed on or about the 31st March 1900, as well as acts said to have taken place on or about 15th May 1900. The particulars of the offence stated to the accused were firstly that he "being the owner of a house allowed gambling to be openly carried on in (his) house" and secondly that he "advanced or lent money to one Maung Than..... in order that he (might) gamble in (his) house." The Magistrate next proceeded to examine eight men who had, he said, been absolved from punishment under section 2 of the Gambling Act. The case against the accused depended entirely on the evidence of these eight witnesses who were accomplices.

Held—that offences under clause (a) and (d) of the Burma Gambling Act are distinct and may be separately punished.

Held also—that the omission of the Magistrate to comply with the imperative rule of law laid down in section 191, Code of Criminal Procedure, was a defect which invalidated the whole trial.

Held also—that by section 14 of the Gambling Act the Magistrate was precluded from taking cognizance of any offence under section 12 of the Act committed more than a month before the offence was reported to him.

Held also—that it is not *per se* an offence for any man to allow gambling to be carried on in his house, whether openly or secretly, or even to lend money to people to gamble in his house.

Held also—that absolution under section 9, Gambling Act, was superfluous, as the persons absolved were not alleged to have gambled in a common gaming-house within seven days before their conduct was reported to the Magistrate.

Held also—that, though section 9 of the Gambling Act by inference renders it admissible to examine persons who are accomplices of the accused, it does not invest their testimony with any special value beyond that which ordinarily attaches to the evidence of accomplices.

THE accused has been convicted of using his house as a common gaming-house and of advancing money to persons who frequented his house for gaming; and has been sentenced separately under clause (a) and clause (d) of section 12 of the Burma Gambling Act. I am not prepared to say that a person cannot be convicted and sentenced under clause (a) and clause (d) of the above section if he keeps a com-

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mon gaming-house and advances money for the purpose of gambling therein. The offences are distinct and may, in my opinion, be separately punished.

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But there are several points in the case which call for comment. The Magistrate took cognizance of the offence on a report by a Township Judge. It is clear therefore that he took cognizance under section 190, sub-section (1), clause (c), of the Code of Criminal Procedure. It was therefore his duty, under section 191 of the Code, to inform the accused that he was entitled to be tried by another Court. The omission of the Magistrate to comply with this imperative rule of law is not a mere error of procedure. It is a defect which invalidates the whole trial. Even if it were held to be an error of procedure, it could not be passed over in this case, for the Magistrate's remarks in the diary, under date 30th May 1900, and in the judgment show that he had conceived an opinion as to the guilt of the accused before he began the trial. The accused was certainly prejudiced by having the case tried by the Subdivisional Magistrate.

The Township Judge's report was received by the Subdivisional Magistrate on 30th May 1900. The Magistrate was therefore precluded by section 14 of the Gambling Act from taking cognizance of any offence under section 12 of the Act committed before 30th April 1900. Yet in stating the particulars of the offence to the accused, the Magistrate included reference to acts committed on or about 31st March 1900, as well as to acts said to have taken place on or about 15th May 1900. The particulars stated disclosed no offence. The first head of the accusation was that the accused "being the owner of a house allowed gambling to be openly carried on in (his) house;" the second was that he "advanced or lent money to one Maung Than... .. in order that he (might) gamble in (his) house." The Magistrate should know that it is not *per se* an offence for any man to allow gambling to be carried on in his house, whether openly or secretly, or even to lend people money to gamble in his house. The accused was therefore prejudiced by not having the particulars of the offence correctly explained to him.

The Magistrate next proceeded to examine eight men who had, he said, "been absolved from punishment under section 9 of the Gambling Act." Absolution was superfluous in the case of these men as they are not alleged to have gambled in a common gaming-house within seven days before their conduct was reported to the Magistrate. They were or should have been, therefore, secured from punishment already.

The case against the accused depended entirely on the evidence of these eight witnesses. They were accomplices and though section 9 of the Gambling Act by inference renders it admissible to examine persons who are accomplices of the accused, it does not invest their testimony with any special value beyond that which ordinarily attaches to the evidence of accomplices. The ordinary rule is that an accomplice is unworthy of credit unless he is corroborated in material particulars

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and that the evidence of one accomplice does not corroborate that of another within the meaning of the former part of the Rule. No doubt a conviction is not illegal merely because it is based on the evidence of an accomplice. But when a Magistrate convicts on the evidence of accomplices, he is bound to explain clearly the reasons why he considers their testimony trustworthy.

Of these eight men, only one, Maung Than, gives the date on which he gambled in the accused's house and on which the accused took commission. He gives the date as 16th May 1900. This man, it may be remarked, had borrowed money from the accused. It was to his interest to show that the money was borrowed for the purpose of unlawful gaming. The fact that anything was done within a month before the Magistrate received the report rests on this man's unsupported evidence. The other witnesses all say that they gambled in the accused's house and that he took commission from the gamblers. If this is true, he no doubt committed an offence under section 12 of the Gambling Act. But not one of them mentions any date. It is clear that the Magistrate did not realize that the date was not an essential ingredient of the offence, but essential with reference to his power to take cognizance of it. These witnesses were allowed to tell their story without check. So reckless were there assertions, or so careless was the Magistrate to ascertain and record a witness's meaning that one witness said he had gambled six times with six other witnesses some of whom swore they had gambled only once, twice, or thrice.

The Magistrate then examined the accused and elicited from him that he had gambled in his house two or three times in the month of *Kazon*. As *Kazon* began on the 28th April, this was not really an admission of anything within a month before the receipt of the report. Moreover, the accused did not admit that he had used his house as a common gaming-house. He was not asked any question to that effect. All that he admitted was that he had gambled in his house. This is what the Magistrate calls "giving in and admitting the whole thing." He then proceeded to convict the accused.

The whole proceedings constituted a travesty of the forms of justice. The Magistrate did not bring an unbiassed mind to the trial. Before he began he recorded that the accused's procedure deserved severe punishment. He disregarded an imperative rule of law. He paid no attention to the provisions of the Act under which he professed to try the accused or to the ordinary rules and principles of evidence. A conviction had under such conditions cannot possibly be sustained. It is to be regretted that the District Magistrate did not observe the above points and report the case to this Court.

The conviction of Ya Po under clause (a) and clause (d) of section 12 of the Gambling Act is reversed and it is ordered that the fines be refunded to him.

Gambling—17.

Gambling—17.

Before H. Thirkell White, Esq., C.J.E.

QUEEN-EMPRESS v. NGA KYAUK MAW.

*Procedure in demanding security with reference to section 17, Gambling Act—
Appeal against order passed by Subordinate Magistrate lies to the District Magistrate.*

*Criminal Revision
No. 1179 of
1900.
November
27th.*

The accused was ordered to furnish security to be of good behaviour on the ground that he earned his livelihood, in part, by promoting unlawful gaming. He appealed to the District Magistrate who held that the case was not under section 118 of the Code of Criminal Procedure and that therefore an appeal did not lie under section 406 of the Code.

Held,—that in demanding security with reference to section 17 of the Gambling Act, the Magistrate must be held to act under section 118 of the Code of Criminal Procedure and consequently that an appeal lies to the District Magistrate under section 406 of the Code.

THE accused was ordered to furnish security to be of good behaviour on the ground that he earned his livelihood, in part, by promoting unlawful gaming. He appealed to the District Magistrate who held that the case was not under section 118 of the Code of Criminal Procedure, and that therefore an appeal did not lie under section 406. The District Magistrate did not perhaps refer to section 17 of the Gambling Act. That section does not in terms empower a Magistrate to demand security. It empowers him to deal with any person concerning whom he receives certain information as nearly as possible as if the information were of the description mentioned in section 110 of the Code of Criminal Procedure. How then must he deal with him? He must record an order under section 112 and proceed in accordance with the following sections of the Code and, if he finds it necessary to demand security, he must make an order under section 118. That is the only section under which, proceeding as nearly as may be as if the information was of the description mentioned in section 110, the Magistrate can make an order demanding security. Against that order, when passed by any Magistrate other than a District Magistrate, an appeal lies to the District Magistrate under section 406 of the Code of Criminal Procedure.

I therefore reverse the order of the District Magistrate and direct him to deal with the appeal of Kyauk Maw in accordance with law.

Gambling—17.

Criminal Revision
No. 345 of 1901.
June
4th.

Gambling—17.

Before G. W. Shaw, Esq.

NGA HÔK v. KING-EMPEROR.

Mr. H. N. Hirjee—for applicant.

Unlawful gaming—Promoting or assisting in the promotion of—Evidence of general repute.

The accused was prosecuted under section 17 of the Gambling Act and ordered to furnish security in the sum of Rs. 1,000. The evidence actually adduced consisted of the statements of two witnesses, who said they had heard that applicant practised or permitted unlawful gaming in his house, of four witnesses, who said they had heard that accused allowed gambling at his house, but whether lawful or not they had not heard, or three witnesses who said they had themselves, once in a way seen unlawful gaming at accused's house; and of one witness who said that it was well known in the town that accused permitted unlawful gaming at his house.

Pointed out,—that what had to be proved was that applicant partially earned his livelihood by unlawful gaming or by promoting or assisting in the promotion of unlawful gaming and, under section 117 (3), Criminal Procedure Code, these facts might be proved "by evidence of general repute or otherwise."

Held—that the statements of the witnesses who heard this or that were not evidence of general repute.

Reference—I. L. R., 23 Cal., page 621.

THE order requiring security in this case is bad.

What had to be proved (*see* section 17, Gambling Act, and the Magistrate's order under section 112, Criminal Procedure Code) was that applicant partially earned his livelihood by unlawful gaming, or by promoting or assisting in the promotion of unlawful gaming, and under section 117 (3), Criminal Procedure Code, these facts might be proved "by evidence of general repute or otherwise."

The evidence actually adduced consisted of the statements of two witnesses who said they had heard that applicant practised or permitted unlawful gaming in his house, of four witnesses who said they had heard that accused allowed gambling at his house, but whether lawful or not they had not heard, of three witnesses who said they had themselves, once in a way, seen unlawful gaming at accused's house and of one witness who said that it was well known in the town that accused permitted unlawful gaming at his house.

The statements of the witnesses who heard this or that are not evidence of general repute. This is well explained in the case of *Ram Parshad** and it is very doubtful if the last-mentioned witness's evidence is evidence of general repute and not merely evidence of the existence of a rumour. There remains the evidence of the three witnesses who say that they have themselves seen unlawful gaming permitted at accused's house. I do not think much weight can be attached to vague statements of this kind with no particulars of time so that the applicant can meet and repute them.

* I. L. R., 23 Cal., page 621.

Gambling—17.

There is, on the other hand, the evidence of five witnesses, who appear to be men of position and respectability, who say that applicant is a well-to-do man and a contractor and has a good reputation.

NGA HÔE
v.
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In these circumstances the Magistrate was not justified in requiring security.

It is possible that if the Magistrate had put the proper questions to the witnesses they might have given evidence that applicant had a general repute as a promoter of unlawful gaming, but this cannot be presumed.

The order of the Magistrate requiring security is set aside.

Municipal—121.

Municipal—121.

Criminal Revision
No. 819 of
1899.
September
29th.

Before H. Thirkeil White, Esq., C.I.E.

MAPARA v. THE MUNICIPAL COMMITTEE OF MANDALAY.
Mr. H. N. Hirjee—for applicant. | Mr. R. C. F. Swinhoe—for respondent.

Construction of section 121 of the Burma Municipal Act, 1898.

The applicant was convicted and fined Rs. 10 for disobeying an order of the Municipal Committee to allow the scavengers of the Municipality to have passage over his land for the purpose of scavenging on the premises of another person.

Held—that section 121 of the Municipal Act empowers the Committee to require an owner to allow servants of the Committee reasonable access to, or passage over, his land for scavenging purposes, whether these purposes concern the land in question or other land.

I RESERVED orders in this case in order to ascertain whether any Indian or English cases, or the provisions of any other Municipal enactment, might be found to throw light on the proper interpretation of the section. But search has not revealed any authorities on the subject. The question concerns the construction of section 121 of the Burma Municipal Act, 1898, which is as follows:—

“The Committee may, by notice in writing, require the owner of any land to allow its servants such reasonable access to, or passage over, his land for scavenging purposes as it may direct.”

For the applicant it is urged that this section merely allows the Committee to require owners to allow reasonable access to, or passage over, their land for scavenging purposes connected with the land itself; and that it does not allow the servants of the Committee to have access to, or passage over, the land for the purpose of scavenging some one else's land. In the concrete case, the Committee wish its scavengers to pass over Mapara's land for the purpose of scavenging the premises of Abdul Khorasani.

It is clear that the construction which the applicant would place on the section involves the proposition that some such words as “in respect of such land” should be understood after the words “scavenging purposes.” I think it is also reasonable to hold that, if this construction is correct, the words “or passage over” are superfluous. It would have been sufficient to provide for reasonable access to the land for scavenging purposes; and it could hardly have been held that reasonable access for those purposes empowered the scavengers to enter on the extreme edge of the land, but not to move about on it. The acceptance of the contention of the learned advocate for the applicant involves, therefore, two assumptions, *first*, that the Legislature omitted words necessary to make its meaning clear; and, *secondly*, that it inserted words which were superfluous and unnecessary.

I am not aware of any canon of construction which would justify these assumptions. The section, as it stands, is not ambiguous. It must, I think, be construed according to its plain and grammatical meaning. This is the meaning which the Magistrate has put upon it

Municipal—121.

in this case, namely, that it empowers the Committee to require an owner to allow the servants of the Committee reasonable access to, or passage over, his land for scavenging purposes, whether these purposes concern the land in question or other land. The rights of residents of the Municipality are sufficiently protected by the provision that the access to, or passage over, the land must be reasonable.

The application for revision is therefore dismissed.

MAPARA
v.
THE MUNICIPAL
COMMITTEE OF
MANDALAY.

Opium—9 (c).

Criminal Revision
No. 232 of
1897.
July
15th.

Opium—9 (c).

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS v. NGA KYAW GAUNG.

Mr. H. M. Litter, Government Prosecutor—for the Crown.

Opium Act, 9 (c)—Possession of opium without license—Opium carried by a servant for his master—Possession as distinguished from custody—Bonâ fide custody of a servant on behalf of his master of opium which the latter is legally entitled to possess—Not possession within the meaning of the law—Secus, if master could not legally possess.

The accused in this case was convicted under section 9 (c) of the Opium Act for possessing five tolas of opium without having a pass or license from the Collector, and was sentenced to a fine of ten rupees.

The Magistrate considered that the offence was purely a technical one which did not call for severe punishment.

The Magistrate accepted the evidence for the defence that the accused was the servant of a Chinaman who sent him with a letter to another Chinaman for the purpose of procuring opium.

The opium was purchased at the licensed shop and was made over to accused to carry to his master.

But on the road the police stopped accused, who acknowledged at once that he had the opium and handed it over. The Magistrate was of opinion that, though the accused was a "mere carrier from one employer to another, both of whom were authorized to possess opium," still he was in possession of opium and had committed an offence under the Act.

According to English law, if a servant receives anything for his master from a third person, not being his fellow-servant, he has the possession as distinguished from the custody of it, until he has put it into his master's possession by putting it into a place or thing belonging to his master, or by some other act of the same sort, whether the servant himself has or has not the custody of that place or thing.

But it was doubted whether any such doctrine applied in India, where there appears to be no reason why the possession of the master should not be held to begin immediately upon the servant receiving a thing on his behalf.

In the present instance, anyhow, there was no difficulty about holding that the accused, when he received the opium, obtained only the custody and not the possession, and that the possession of the master began when he so received the opium, provided the master was legally entitled to possession and the servant was acting under lawful orders.

Held,—that if the accused had had the custody of no more than three tolas of opium, which his master was entitled to possess, it might have been found that he, although a Burman, had committed no breach of the Opium Rules on the ground that he was not in possession within the meaning of the law. But the case was complicated by the circumstance that the quantity of opium was more than three tolas.

The explanation of the master was that the opium was not bought for himself alone, but for two friends besides.

But there is no provision in the Opium Rules for the possession of more than three tolas of opium, by one person, nor for the joint possession of more than that quantity by several persons, and consequently the possession of the five tolas found was illegal.

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The fact of the servant being in possession of more than three tolas of opium altered the position. A servant is bound to obey only the lawful commands of his master. If he breaks the law, he incurs personal liability, whatever orders he may be acting under.

✓ If accused had been ignorant of what he was carrying for his master, his custody of the opium would not have amounted to possession.

But he knew perfectly well what he was doing, and he must be presumed to have been aware that a breach of the law was committed by his act. His act was thus independent of the position of a servant.

If the master committed the offence of possessing opium in contravention of the Opium Rules, it was quite clear that the servant abetted the commission of that offence.

Held—accordingly, that the offence committed was either possession, joint possession, or abetment of possession, the last view being perhaps that most free from difficulty of any kind.

Conviction upheld.

References :—

1, U. B. R., 1892—96, page 137.

Digest of Criminal Law by Sir F. Stephen, Art. 306.

Roscoe's Criminal Evidence, page 609.

THE accused in this case has been convicted under section 9 (c) of the Opium Act for possessing five tolas of opium without having a pass or license from the Collector, and has been sentenced to a fine of ten rupees.

The Magistrate considered that the offence was purely a technical one which did not call for severe punishment.

The Magistrate accepted the evidence for the defence that the accused was the servant of a Chinaman who sent him with a letter to another Chinaman for the purpose of procuring opium. The opium was purchased at the licensed shop and was made over to accused to carry to his master. But on the road the police stopped accused, who acknowledged at once that he had the opium and handed it over.

The Magistrate was of opinion that, though the accused was "a mere carrier from one employer to another, both of whom are authorized to possess opium," still he was in possession of opium and had committed an offence under the Act. Under section 9 of the Act, a person is punishable who possesses opium in contravention of the Act or of rules made and notified under section 5, which, *inter alia*, relates to the possession of opium.

Section 4 of the Act forbids any person to possess opium except as permitted by the Act or rules framed under it.

Rule 13 under the Act allows in Upper Burma any non-Burman to possess opium not exceeding three tolas in weight which he has bought from a licensed vendor.

In Upper Burma no permission is given by the Opium Rules to a Burman to possess opium, and the accused in this case was a Burman.

Consequently, if accused possessed the opium found on him, he has committed a breach of law.

The case of *Queen-Empress v. Taw Wa*,* which was decided by Mr

* U. B. R., 1892—1896, page 137.

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Justice Copleston, has been distinguished by the learned Government Prosecutor, but is similar to the present in some respects. The defence there was that the accused, a Chinaman, had purchased the opium found for himself and two other Chinaman, but it was found that the defence was not proved. The Court went on to say, however, that "there is no rule allowing a person to possess opium purchased 'by another person, nor to possess opium in excess of three tolas' weight which has been purchased for other persons, or which has 'been handed over to him to carry. The law must be strictly construed or its ends will be easily defeated."

After the finding of fact that had been come to, this conclusion was not necessary for the decision of the case, but anyhow it does not deal with the question of what constitutes possession, and that is the question which arises for determination in cases of this kind.

The word "possession" as commonly employed in the English language, is of an ambiguous character. It is sometimes used to signify the control of ownership, and at others is confined to the mere keeping or custody of a thing for the owner. In any discussion of the subject it is therefore necessary to keep these two meanings distinct in the mind in order to avoid confusion of thought; and in order to avoid confusion of expression it is desirable, if possible, to employ different terms.

Let us call the full kind of possession "possession," and the other kind "custody."

This distinction is fully recognized by law, for section 27 of the Penal Code provides that, "When property is in the possession of a person's wife, clerk or servant, on account of that person, it is in that person's possession within the meaning of this Code."

Explanation.—A person employed temporarily, or on a particular occasion, in the capacity of a clerk or servant, is a clerk or servant within the meaning of this section.

This is a repetition of the English law on the subject. If we use the terms proposed, we should say that the property was in the custody of the servant, and in the possession of the master.

Sir Fitzjames Stephen, in his Digest of the Criminal Law, Article 306, on Possession, says: "The word 'custody' means such a relation towards the thing as would constitute possession if the person having custody had it on his own account."

He then states the English law as follows:—"If a servant receives anything for his master from a third person, not being his fellow-servant, he has the possession as distinguished from the custody of it, until he has put it into his master's possession by putting it into a place or thing belonging to his master or, by some other act of the same sort whether the servant himself has or has not the custody

"of that place or thing," and the case given in illustration is that of a servant going with his master's cart to fetch coals, where the servant is considered

R. v. Reed—D.
and P., 256.

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to be in possession of the coals while he is carrying them in sacks on his back to the cart, and the master as soon as the coals are put in the cart.

In Note XI the learned author comments on this case and calls the rule it illustrates a "singular doctrine" and I do not think that any such doctrine applies in India, where there appears to be no reason why the possession of the master should not be held to begin immediately upon the servant receiving a thing on his behalf.

In the present instance, at any rate, there is no difficulty about holding that the accused, when he received the opium, obtained only the custody and not the possession, and that the possession of the master began when he so received the opium, provided the master was legally entitled to possession and the servant was acting under lawful orders.

Sir F. Stephen considers it to be shown clearly "that possession means, in the common use of language, a power to act as the owner of a thing coupled with a presumable intention to do so in case of need, and that the custody of a servant, or person in a similar position, does not exclude the possession of another, but differs from it in the presumable intention of the custodian to act under the orders of the possessor with reference to the thing possessed, and to give it up to him if he requires it."

Conversely, it would appear that the possession of the master excludes possession by the servant, that is, be it always understood, lawful possession. It seems plain that this must be the intention of the law, for the contrary would lead to absurd and unjust consequences, which it is impossible to believe could have been contemplated.

For example, Opium Rule 13 quoted above permits possession of three tolas of opium by a Chinaman, which the possessor himself has bought from a licensed vendor. If possession were meant to include the custody of a servant, then the Chinese servant of such purchaser, left in charge of his master's house with the opium in it would be punishable for possessing such opium because he had not bought it himself.

Again, the Native butler of a European gentleman looking after the house while his master is absent at his office, would be liable under the Arms Act, or the Excise Act, for being in possession of his master's guns or wine.

It may safely be affirmed that no such ridiculous *reductio ad absurdum* could ever have been intended by the Legislature.

If, therefore, the accused here had had the custody of no more than the three tolas of opium which his master was entitled to possess, I should have been prepared to hold that he, although a Burman, had committed no breach of the Opium Rules on the ground that he was not in possession within the meaning of the law. But the case is complicated by the circumstance that the quantity of opium was

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more than three tolas. The explanation of the master is that the opium was not bought for himself alone, but for two friends. But there is no provision in the Opium Rules for the possession of more than three tolas of opium by one person, nor for the possession of more than that quantity by several persons, and consequently the possession of the five tolas found was illegal.

This fact alters the position. A servant is bound to obey only lawful commands of his master. If he breaks the law, he is personally liable, whatever orders he may be acting under.

If the accused had been ignorant of what he was carrying for his master, his custody of the opium would not have amounted to possession. But he knew perfectly well what he was doing, and he must be presumed to have been aware that a breach of the law was committed by his act.

His act was thus independent of the position of a servant, and in taking charge of the opium may be regarded as possession, possession, or abetment of possession. The last view is perhaps the most free from difficulty of any kind. If the master committed the offence of possessing opium in contravention of the Opium Act, it is quite clear that the servant abetted the commission of the offence.

For these reasons the conviction may be sustained either under section 9 of the Opium Act, or under that section and section 489 of the Penal Code, together.

Opium—9 (c).

Opium—9 (c).

Before G. D. Burgess, Esq., C.S.I.

LAW CHEIN AND LAW YIN v. QUEEN-EMPRESS.

Mr. H. M. Litter, Government Prosecutor—for the Crown.

Opium Act 9 (c)—Possession—Abetment.

References:—

1, U. B. R., 1897—1901, page 232.

THE case of the second applicant is not pressed.

As to first accused it is urged that there ought to be some evidence to connect him with the contraband opium.

The case against first applicant-accused is one primarily of presumption, or, in other words, it is circumstantial, which merely means that the evidence of eye-witnesses to direct acts is wanting.

But it is no less strong on that account, and is such as is most commonly relied upon both in the ordinary affairs of life and in scientific investigation. Human experience shows that one thing is invariably, or all most invariably, connected with another, and so it relies on the presence of both from proof of the presence of one only.

Now here first accused was the licensee of the opium shop, which belonged to him to a large extent; which was under his control; and in which the other accused were working under him as their master, the second accused being the next in authority beneath him. In this shop there should have been a certain amount of opium corresponding with the quantity taken from the treasury as diminished by sale.

There was not this quantity, but a discrepancy; but besides that there was upwards of 40,000 tolas of opium concealed in various parts of the shop. In fact this enormous quantity of the contraband drug may be said to have been hidden over the shop in every direction, and the shop can only be accurately described as stuffed with it. *Prima facie* the presumption from the state of things would be that the owner of the shop and every one concerned in carrying on the business must have been perfectly well aware that the shop was being used as an emporium for the storage of illicit opium.

This inference would be drawn under section 114 of the Evidence Act, which requires the Courts to apply the rules of common sense to the facts of daily life which are brought before them. The presumption could of course be rebutted by proving inconsistent circumstances, but this has not been done except by the introduction of a cock-and-bull story about second accused keeping the opium for a friend and trying also to sell it to outsiders.

Consequently the burden of proof laid upon the accused has not been lifted.

*Criminal Revision
No. 216 of
1898,
March
29th.*

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This is so even without applying section 10 of the Opium Act, which makes special provision for laying the burden of accounting satisfactorily for opium on persons prosecuted under section 9.

The presumption extends to the accused other than the present applicants, whose case has been referred to the High Court for revision by the Court of Session.

It is a reasonable inference that these persons could not have been working as they were about the opium shop without being privy to the smuggling with which it was filled. The thing was an impossibility.

Consequently they come under the ruling in *Queen-Empress v. Kyaw Gaung*,* that as the possession was illegal, they were not protected by their position as servants, but must be treated as aiders and abettors. On these grounds the conviction of all the accused must stand, with the addition of section 190, Penal Code, to that of the accused subordinate to the applicants.

The sentence on the applicants is severe, and deservedly so, for it corresponds to the scale of their illicit operations. Interference is not necessary and would not be appropriate. This application is dismissed, and in the case of the other accused, No. 147, the conviction and sentences will stand as they are.

* Page 232.

Opium—9.

Opium—9.

Before F. S. Copleston, Esq.

NGA PO THA AND ANOTHER v. QUEEN-EMPRESS.

Mr. R. C. F. Swinhoe—for applicants.

Opium Act, 9—Possession of opium without license.

*Criminal Revision
No. 1152 of
1898.
January
30th,
1899.*

It was urged in this case that the arrest was made by persons unauthorized by law to make an arrest in an opium case, and that therefore the presumption referred to in section 10 of the Opium Act does not arise and that the prosecution should have proved that the accused had not got a license for possession of the opium, and should have offered distinct evidence to show that the possession could not be lawful.

Held,—that for a conviction under the Opium Act it matters not, so far as the legality of a conviction goes, by whom the accused was arrested or found in possession.

THIS is an application in revision against a conviction under section 9 of the Opium Act for possession of a very large quantity of opium. I may say at the outset that I do not propose to discuss the findings of fact, but I may add that I see no reason whatever for doubting that the two applicants were found in possession of the boxes which, on being opened, were found to contain the opium. They had unearthed some of the boxes and laid bare the others. Nor can I doubt for a moment that the applicants went to this spot in order to unearth the boxes, being well aware of what they contained. There is no possible reasonable doubt of this knowledge. But it is urged that the arrest was made by persons unauthorized by law to make an arrest in an opium case, which is true, and that therefore the presumption referred to in section 10 of the Opium Act does not arise and that the prosecution should have proved that the accused had not got a license for possession of the opium, were not Government officers, &c., and should have offered distinct evidence to show that the possession could not be lawful. To require the Crown to prove a negative—to the effect that the accused could not lawfully be in possession of 14,000 tolas of opium—would be unreasonable and absurd. The accused denied possession and knowledge and, if the Magistrate had acquitted the accused because they might possibly be licensed transporters of opium he would have shown himself hardly qualified for reasonable society. Further, I can see no reason for holding that section 10 of the Act does not apply. Section 9 makes punishable possession of opium, and possession such as that of the accused, by whomsoever they were arrested, in possession "in contravention of this Act or of rules," &c. The Rulings of this Court on sections 4 and 13 of the Public Gambling Act have been quoted in support of the learned advocate's contention, but I think he has lost sight of the fact that those decisions turn mainly on the point that the expressions used in the sections are not "whoever gambles," &c., but whoever is *found* gaming. For a conviction under the Opium

Opium—9.

NGA PO THA Act it matters not, so far as the legality of a conviction goes, by
v. whom the accused was arrested or found in possession.
QUEEN-EMPRESS. The other point urged in support of this application is that the
evidence of the witnesses who say they saw the accused digging out
the boxes should be disbelieved, because they wrongfully arrested the
accused, and hoped for a reward in case of conviction. I have no
doubt the Courts below considered carefully whether the witnesses,
evidence was exaggerated or untrue, in view of the fact that they were
likely to profit by a conviction.

As to the question of arrest, I note that it is not even clear that this
was illegal, for it appears that the accused were thought at the time
to be disposing of stolen property and they were arrested in the act.
The Sessions Judge has remarked on this.

This application is rejected.

Opium—9 (c).

Opium—9 (c).

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. KYEIN KWUN.

Opium Act, 9 (c)—Offences under.

*Criminal Revision
No. 1161 of
1898.
January
14th,
1899.*

Held—that when an accused person is convicted of an offence under the Opium Act under conditions which lead the Magistrate to conclude that he is engaged in traffic in opium on a large scale, or in transporting opium in considerable quantities, a substantive term of imprisonment may appropriately be awarded in addition to a substantial fine.

I agree with the District Magistrate in thinking that the sentence in this case was inadequate. Without wishing to limit the discretion of Magistrates, who must consider the circumstance of each case on its merits and apportion penalties accordingly, I think it may safely be laid down as a general principle that when an accused person is convicted of an offence under the Opium Act under conditions which lead the Magistrate to conclude that he is engaged in traffic in opium on a large scale or in transporting opium in considerable quantities, a substantive term of imprisonment may appropriately be awarded in addition to a substantial fine. When opium is smuggled or sold in large quantities, the profits are probably such that the prospect of a sentence of fine only does not act as a deterrent. These remarks do not conflict with the remarks of my learned predecessor in *P'in Ye's* case.*

In the present case it is not necessary to take steps for the enhancement of the sentence.

*1, U. B. R., 1892—96, page 139.

Opium—9 (c), 10.

Criminal Revision
No. 1145 of
1900.
December
13th.

Opium—9 (c), 10.

Before H. Thirkell White, Esq., C.I.E.

WAING SHWAN v. QUEEN-EMPRESS.

Mr. S. C. Dutta—for applicant.

Mr. H. M. Lütter, Government Prosecutor—for the Crown.

The holder of a mate's receipt is presumed till the contrary is proved, to be in possession of the consignment covered by it.

The accused was found in possession of two mate's receipts which covered nine packages carried by a steamer from Bhamo to Mandalay and were found, on arrival, to contain a large quantity of opium. The only point argued in this application was that the mere possession of the mate's receipts did not show that the accused knew that the consignment covered by them contained opium, and that unless he had this knowledge he could not be held to have been in possession of the opium.

Held—that the accused was aware that he was in possession of the mate's receipts and constructively of the packages covered by them.

Held also,—that under section 10 of the Opium Act the accused having been found in constructive possession of packages containing opium was bound to account satisfactorily for it and to prove that no offence was committed by him in respect of it.

References :—

1, U. B. R., 1892—1896, page 339.

1, U. B. R., 1897—1901, page 232.

S. J. L. B., page 573.

THE facts found, and no doubt rightly found, by the Lower Courts are that two mate's receipts were found in possession of the accused and that these receipts covered nine packages carried by a steamer of the Irrawaddy Flotilla Company from Bhamo to Mandalay, and found, on arrival at Mandalay, to contain a large quantity of opium. It is not disputed that, if the accused-applicant was in possession of the mate's receipts and if he knew that the consignment covered by them consisted of or contained opium, he must be held to have been in possession of the opium. I think that this proposition is sound. The possession of the mate's receipts, gave the holder the exclusive right to obtain delivery of the consignment; and in these circumstances I think he is rightly held to have been constructively in possession of it. The principle is the same as that laid down in *Pin Ye v. Queen-Empress** and further developed in the *Queen-Empress v. Kyaw Gaung*†.

The only point argued in this application is that the mere possession of the mate's receipts did not show the accused knew that the consignment covered by them contained opium; and that unless he had this knowledge he could not be held to have been in possession of the opium. He might have been entirely ignorant of the contents of the packages and no more liable to conviction for illegal possession of

* 1, U. B. R., 1892—1896, page 139.

† 1, U. B. R., 1897—1901, page 232.

Opium—9 (c), 10.

opium than would be a person standing in the street into whose hands a smuggler pursued by the police should thrust a packet of opium as he ran by. It may be conceded that "possession" implies knowledge on the part of the alleged possessor, not only, as explained in *Queen-Empress v. Chit Aung*,* as to the fact of possession, but as to the nature of the object possessed. The case just mentioned was cited in argument; but it does not apply to the case under consideration. It was a case in which the accused was not found to have known that the opium which he was charged with possessing was in his keeping. Here it cannot be disputed that the accused knew that he was in possession of the mate's receipts and constructively of the packages covered by them. But it is necessary to find that he knew what the packages contained. This was explained in the case of *Kyaw Gaung* above cited in which it was said—

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"If accused had been ignorant of what he was carrying for his master, his custody of the opium would not have amounted to possession."

It may also be allowed that the mere possession of the mate's receipts did not conclusively prove that the accused knew the contents of the consignment. But it is obvious that it raised a presumption that he did so and that the burden of proving that he had not this knowledge rested on him. Reference may be made again to the case of *Pin Ye*,† where the effect of sections 114 and 106 of the Evidence Act and of section 10 of the Opium Act was pointed out. Under section 114 of the Evidence Act, the Court may justly presume that a person who is in possession of documents constituting him the possessor of a valuable consignment is aware of the nature of the consignment. Under section 106 of the same Act, the nature of the accused's connection with the mate's receipts, which it is suggested might have been sent to him by an enemy for the purpose of getting him into trouble, was a fact especially within his knowledge, and the burden of proving it was therefore on him. Under section 10 of the Opium Act, the accused having been found in constructive possession of packages containing opium, was bound to account satisfactorily for it and to prove that no offence was committed by him in respect of it.

The accused made no attempt to show that he was an innocent holder of the mate's receipts. His defence was that they were never in his possession at all. It is idle for his advocate at this stage to suggest that, though he was in possession of the mate's receipts and therefore of the packages to which they referred, he may have been ignorant of the nature of the consignment.

I am of opinion that there can be no possible doubt as to the correctness of the conviction in this case, and I dismiss the application for revision.

* S. J. L. B., page 573.

† 1, U. B. R., 1892—1896, page 139.

Penal Code—63.

Penal Code—63.

Criminal Revision
No. 318 of
1900.
April
3rd.

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS *v.* VENGALASAWMY.

Penal Code, 63—Measure of punishment in imposition of fine.

In criminal cases the measure of punishment must be carefully regulated and in the imposition of a fine due proportion must be preserved with regard to the nature of the offence and the means of the offender.

Section 63, Penal Code, says : " Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive ; " and it has been remarked : " The description of fine which it was the object of section 63 of the same Code to prohibit was a

VII W.R. Cr. R. fine which it would be impossible or very difficult for the accused person to pay or wholly disproportionate to the character of the offence."

The principle involved applies whether the section itself is directly applicable or not.

The following extract from Lord Macaulay's note on the Chapter of Punishments in the draft Penal Code may advantageously be quoted for guidance.

" Fine is one of the most common punishments in every part of the world, and it is a punishment the advantages of which are so great and obvious that we propose to authorize the Courts to inflict it in every case except where forfeiture of all property is necessarily part of the punishment. Yet the punishment of fine is open to some objections. Death, imprisonment, transportation, banishment, solitude, compelled labour are not indeed equally disagreeable to all men. But they are so disagreeable to all men that the Legislature, in assigning these punishments to offences, may safely neglect the differences produced by temper and situation. With fine the case is different. In imposing a fine it is always necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence. The mulct which is ruinous to a labourer is easily borne by a tradesman and is absolutely unfelt by a rich zemindar.

" It is impossible to fix any limit to the amount of a fine which will not either be so high as to be ruinous to the poor, or so low as to be no object of terror to the rich. There are many millions in India who would be utterly unable to pay a fine of fifty rupees. There are hundreds of thousands from whom such a fine might be levied, but whom it would reduce to extreme distress ; there are thousands to whom it would give very little uneasiness ; there are hundreds to whom it would be a matter of perfect indifference and who would not cross a room to avoid it. The number of the poor in every country exceeds in a very great ratio the number of the rich. The number of poor criminals exceeds the number of rich criminals in a still greater ratio. And to the poor criminal it is a matter of absolute indifference whether the fine to which he is liable be limited or not, unless it be so limited as to render it quite inefficient as a mode of punishing the rich. To a man who has no capital, who as laid by nothing, whose monthly wages are just sufficient to provide himself and his family with their monthly rice, it matters not whether the fine for assault be left to be settled by the discretion of the Courts, or whether a hundred rupees be fixed as the maximum. There are no degrees in impossibility. He is no more able to pay a hundred rupees than to pay a lac. A just and wise judge, even if entrusted with a boundless discretion, will not, under ordinary circumstances, sentence such an offender to a fine of a hundred rupees ; and the limit of a hundred rupees would leave it quite in the power of an unjust or inconsiderate judge to inflict on such an offender all the evil which can be inflicted on him by means of fine.

" If, in imitation of Mr. Livingston, we provide that no fine shall exceed one-fourth of the amount of the offender's property, no serious fine will ever be imposed in this country without a long and often a most unsatisfactory investigation

Penal Code—63.

in which it would be necessary to decide many obscure questions of right purposely darkened by every artifice of chicanery. And even if this great practical difficulty did not exist, we should see strong objections to such a provision in a very large class of cases. Take the case of a corrupt judge who has accumulated a lac of rupees by his illicit practices. A fine which should deprive such a man of the whole of his fortune would not appear to be excessive. And certainly we should think it most undesirable that he should be allowed to retain 75,000 rupees of his ill-gotten gains. Again, take the case of a man who has been suborned to commit perjury and has received a great bribe for doing so. Such a man may have little or no property, except what he has received as a bribe. Yet it is evidently desirable that he should be compelled to disgorge the whole. No man ought ever to gain by breaking the law; and, if Mr. Livingston's rule were adopted in this country, many would gain by breaking the law. To punish a man for a crime, and yet to leave in his possession three-fourths of the consideration which tempted him to commit the crime, is to hold out at once punishments for crime and inducements to crime. It appears to us that the punishment of fine is a peculiarly appropriate punishment for all offences to which men are prompted by cupidity, for it is a punishment which operates directly on the very feeling which impels men to such offences. A man who has been guilty of great offences arising from cupidity, of forging a bill-of-exchange for example, of keeping a receptacle for stolen goods, or of extensive embezzlement, ought, we conceive, to be so fined as to reduce him to poverty. That such a man should, when his imprisonment is over, return to the enjoyment of three-fourths of his property, a property which may be very large, and which may have been accumulated by his offences, appears to us highly objectionable. Those persons who are most likely to commit such offences would often be less deterred by knowing that the offender had passed several years in imprisonment than encouraged by seeing him after his liberation enjoying the far larger part of his wealth.

"We have never seen any general rule for the limiting of fine, which we are disposed to adopt. The difficulty of framing a rule has evidently been felt by many eminent men. The authors of the Bill of Rights, with many instances of gross abuse fresh in their recollection, could devise no other rule than that excessive fines should not be imposed. And the authors of the Constitution of the United States, after the experience of another century, contented themselves with repeating the words of the Bill of Rights.

"It will be seen that in cases which are not very heinous we propose to limit the amount of fine which the Courts may impose.* But in serious cases we have left the amount of fine absolutely to their discretion; and we feel, as we have said, that, even in the cases where we have proposed a limit such a limit will be no protection to the poor, who in every community are also the many. We feel that the extent of the discretion which we have thus left to the Courts is an evil, and that no sagacity and no rectitude of intention can secure a judge from occasional error. We conceive, however, that if fine is to be employed as a punishment, and no judicious person, we are persuaded, would propose to dispense with it, this evil must be endured. We shall attempt in the Code of Procedure to establish such a system of appeal as may prevent gross or frequent injustice from taking place."

Judgment in Revision.

THE Magistrate considers it reasonable to fine a Madrasi butler, whose means of support are Rs. 20 a month, ten rupees, or half his month's pay, for unseemly behaviour under the influence of liquor within the limits of a railway by taking off his coat and giving an invitation to fight in the pressing but inelegant idiomatic terms of the English language commonly in use among the lower orders upon occasions of the sort. If the same measure of justice and punish-

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ment were dealt out to, say, a Magistrate who, if it be allowable to imagine the possibility of such a thing for the sake of illustration, might have looked upon the wine when it was red, and a penalty of some hundreds of rupees were imposed on him, it is certain that the voice of the convict would soon be heard raised in loud and importunate protest against abuse of authority and excessive and uncalled for severity. And the poor must not be oppressed because their cries are not equally clamorous, and it is the badge of all their tribe to suffer in silence.

The Magistrate ought to have perceived that he was imposing a pecuniary penalty out of proportion to the petty misdemeanour he was punishing and to the means possessed by the poor person he was compelling to pay it.

The amount of the fine is reduced to one rupee.

 Penal Code—73.

 Penal Code—73.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. NGA KAING.

Penal Code 73—Solitary confinement—Cumulative sentences of—contrary to the intention of section 73, Penal Code.

*Criminal Revision
No. 851 of
1898.
October
20th.*

The accused was sentenced to solitary confinement for three months is one trial and to solitary confinement for a further term of three months in a subsequent trial or to a sentence of six months' solitary confinement in all.

Held,—that the intention of section 73 of the Indian Penal Code is that a term of three months is the maximum period of solitary confinement that can be judicially awarded in a continuous period of imprisonment.

References :—

I, U. B. R., 1892—96, page 146.

L. B. R., 1896, page 213.

IN Criminal Regular Trial No. 29, the accused was sentenced to rigorous imprisonment for seven years, of which three months were to be passed in solitary confinement. In case No. 31, which was tried a few days before, the accused had already been sentenced to imprisonment for four years, of which three months were to be in solitary confinement. He has thus been sentenced to solitary confinement for six months. In Criminal Revision No. 1695 of 1892* it was pointed out that cumulative sentences of solitary confinement were contrary to the intention of section 73, Indian Penal Code. The same view was taken in Criminal Revision No. 946 of 1892 of this Court, from which the following extract may be quoted :—

“When there were so many charges against the same man in the same Court more than one sentence of solitary confinement should not have been passed. Though the case of different convictions is not specially provided for, it seems clear that the spirit of the law is against prolonged solitary confinement.”

This ruling is cited in the case of *Queen-Empress v. Po Tu*.† I am aware that in that case the learned Judicial Commissioner of Lower Burma (Mr. Aston) took the opposite view, and held that it was not against the spirit of the law to make three months' solitary confinement a part of each sentence of imprisonment passed on separate convictions. It has also been pointed out in argument that the Chief Court of the Punjab has ruled to the same effect.

I have attentively considered the Lower Burma ruling cited above, and have heard the argument of the Government Prosecutor. But I see no reason to dissent from the view taken by my learned predecessor in this matter. In my opinion the fact that in section 73 of the Indian Penal Code, the term of solitary confinement cannot exceed three months, whatever may be the term of sentence, clearly indicates the intention that this is the maximum period of solitary confinement that can be judicially awarded in a continuous period of imprisonment.

* I, U. B. R., 1892—96, page 146.

† L. B. R., 1896, page 213.

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I note that the District Magistrate is bound by the rulings of the Court, and that he is not at liberty to dissent from them on the ground that other High Courts have held different views. If he considers that any ruling of this Court is incorrect, he should follow it, but he can arrange to have it brought to notice in revision and duly argued. He is not justified in ignoring the ruling as he did in this case.

So much of the sentence passed in Criminal Regular No. 29 of 1898 as awards solitary confinement to Nga Kaing is set aside.

Penal Code—109-110.

Penal Code—109-110.

Before G. D. Burgess, Esq., C.S.I.

✓ MINGWE NYUN v. QUEEN-EMPRESS.

Mr. Ba Olu—for appellant. | Mr. H. M. Litter, Government Prosecutor—
for the Crown.Criminal Appeal
No. 123 of
1897.
November
1st.*Penal Code ss. 109, 110, 304, 324—Abetment—Abetment if the person abetted does the act with a different intention from that of the abettor—Culpable homicide—Hurt*

During a wrangle between one Mi Ein and a number of women, among whom was the deceased, Mi Ein called for a knife, which the appellant-accused gave her, and the former stabbed and killed the deceased. Mi Ein was convicted by the Court of Session under section 304, Indian Penal Code, of the offence of culpable homicide not amounting to murder and appellant-accused under section 304—109, for aiding and abetting her, and the latter was sentenced to ten years' transportation.

Held,—First, that it was highly improbable, under the circumstances in evidence, that the appellant intended, when she gave the knife, that it should be employed for the purpose of causing death or even grievous hurt.

Held,—Secondly, that the abetment by appellant fell under section 110, Indian Penal Code, the law applicable in such cases being that exhibited in the following illustration to Article 39 of Sir J. Fitzjames Stephen's Digest of the Criminal Law of England:—

"B is indicted for inflicting on C an injury dangerous to life with intent to murder.

"A is indicted for aiding and abetting B.

"A must be shown to have known that it was B's intent to murder C, and it is not enough to show that A helped B in what he did."

Held,—Thirdly, that the conviction under sections 304—109 was therefore incorrect and should have been under sections 324—109, 110.

Conviction altered accordingly and sentence reduced to rigorous imprisonment for two years.

References:—

1, L. R., 6 All., 491.

(Sir J. F. Stephen's) Digest of the Criminal Law of England, Illustration (2), Article 39;

7, W. R. Cr. R., 97.

12, W. R. Cr. R., 52.

THE objections to the finding of fact against the appellant are based upon two grounds, namely, the existence of discrepancies in the evidence and the absence of any complaint against appellant in the first instance.

There are certainly 'a good many contradictions in the evidence, and the appellant is fully entitled to have them considered.

But the result of consideration is not necessarily in appellant's favour.

As already observed in the first appeal, No. 112, in this case, the circumstances must be allowed for under which a number of uneducated women were thrown suddenly into a state of intense excitement by a murderous attack upon the deceased, who was in their

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midst. Their intellectual powers were unquestionably affected, if not thrown off their balance, in respect of both observation and recollection. If they were all to describe events exactly in the same way it would be a cogent reason for disbelieving them, because of the practical impossibility of their all noticing and remembering the same things. Human experience bears ample testimony to the unavoidable variations which occur in the accounts of the same striking transaction given by different narrators of unimpeachable honesty and good faith. Therefore, although the witnesses and deceased vary in their versions of how the knife was conveyed from second accused to first, there is no sufficient reason to refuse to believe the main statement that the knife reached the latter in this way, unless some motive is shown for intentional falsehood, and no such motive is made out. No grudge or enmity is proved which would induce any of the witnesses to speak falsely. The mere circumstance that second accused lived with first and that the presence of both in the neighbourhood may not have been agreeable could not possibly warrant any presumption of hostility to lead the witnesses into making unfounded charges.

As to the second point, it also cannot be deemed of genuine importance.

When deceased was taken to the police-station she had just been fatally wounded, and, if she were not actually unconscious as she alleged herself, she could certainly have been in no fit state to mention all particulars, and it appears that all she is recorded to have said was a few words about the principal and most pressing points.

Deceased's deposition was taken in the course of two or three hours after and she then made a distinct declaration as to appellant's action in regard to the knife, and then appellant was arrested.

Similarly, as to the witnesses. There was no time at first for a complete investigation by the police, and naturally minor matters would stand over for attention till afterwards. It is quite inconceivable that, as suggested, a plot could have been concocted in the interval to implicate appellant groundlessly in the charge. There was neither time nor opportunity for such a thing.

There can be no reasonable doubt at all as to the truth of the substance of the evidence that appellant supplied the first accused with the knife with which the latter killed deceased.

The question upon which the appeal deserved to be admitted for hearing, and upon which it was mainly admitted, is—What was the offence committed by appellant in so acting?

It is difficult to find any case quite corresponding to the present.

The learned Government Advocate has cited 12, W. R. Cr. R., 52, but there apparently a threat was uttered beforehand.

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The cases in 7, W. R. Cr. R., 97 and 6 All., 491, may also be referred to perhaps.

The law applicable in such cases is no doubt that contained in Illustration (2) Article 39 of Sir J. Fitzjames Stephen's Digest of the Criminal Law of England, which is—

R. v. Cruse (1838), 8 C. and P., 541. "B is indicted for inflicting on C an injury dangerous to life, with intent to murder. A is indicted for aiding and abetting B.

"A must be shown to have known that it was B's intent to murder C, and it is not enough to show that A helped B in what he did."

Here women were wrangling, and the principal called for a knife, which the abettor gave her, and the principal stabbed and killed the deceased.

Virtually this is almost all the evidence.

What inference should be drawn from it?

The knife might have been called for in the first instance merely to intimidate and might have been given for that purpose, but the presumption is that more than this must have been contemplated since both accused were provided with slippers in evident preparation for committing an assault.

It may therefore be inferred that the knife was meant to be used.

But to what extent?

Neither the learned Government Prosecutor nor the Court can recall any instance of a similar crime committed by a woman, and it is undoubtedly a rare if not an unprecedented thing for a Burmese woman to proceed to such an extremity in a paltry squabble.

It may safely be concluded therefore that it is highly improbable that the present appellant intended when she gave the knife that it should be employed for the purpose of causing death or even grievous hurt, and that there was not sufficient reason to suppose that it would be used for such a purpose.

The learned Government Prosecutor agrees that the causing of death or injury sufficient or likely to cause death was not in the contemplation of appellant.

Whether her intention, that is, in the legal sense, went so far as the causing of grievous hurt is more doubtful of course, but the balance of probability seems to be that it did not. Appellant has a fair claim to a favourable view of her conduct under the circumstances.

The conviction is accordingly altered to one under sections 324—109, 110, Indian Penal Code, and the sentence is reduced to rigorous imprisonment for two years.

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Criminal Appeal
No. 151 of
1897.
December
24th.

Before G. D. Burgess, Esq., C.S.I.

NGA KAING AND 11 OTHERS v. QUEEN-EMPRESS.

Mr. H. M. Lutter, Government Prosecutor,—for the Crown.

Penal Code 121, 302—Waging war against the Queen—Evidence—Principle and measure of punishment.

THE twelve appellant-accused were found to have been concerned with others in a conspiracy for waging war against the Queen, and this conspiracy was carried into action, in the course of which death was caused to one of the Queen's soldiers and severe wounds to one of Her military officers, while several others of Her subjects were wounded, one of them to danger of life.

There was evidence against the appellants of conspiracy; seven of them bore wounds such as might have been inflicted in the conflict that took place; and they had made, though all but one had withdrawn, confessions of participation, more or less, in the transaction.

The number of active insurgents was small, but reliance was placed in the aid of supernatural powers.

The conviction of all the appellants was held to be correct, and the capital sentence passed upon them appropriate to the circumstances.

All appeals dismissed.

ALL the accused in this case, except one who has been sentenced to transportation for life, have appealed, and their appeals, Nos. 151—162 have been taken together.

The appeals were admitted at once in order that the case might be before the Court as a whole as the most convenient way of dealing with it.

The appeals were presented just before the closing of the Courts, and have been heard under considerable difficulties during the last three days, and the hearing is concluded and judgment given only today, when the Court ought to be closed.

This arrangement has been made in order to avoid the delay which must have taken place if the case had not been heard till after the reopening of the Courts, as I was unwilling to allow so many men to remain under the suspense of a death sentence for any length of time if it could be prevented.

The appellants have had no one to represent them, but the lengthy record has been completely gone through with the valuable assistance of the learned Government Prosecutor, who is acquainted with the proceedings from the beginning, and all necessary points have been tested and verified.

The judgment of the Court of Session contains a full and painstaking statement of all there is for and against each of the accused individually in the way of evidence and confession.

The perusal of the record has shown the substantial accuracy of these summaries, and there is really nothing of any consequence left

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to be added to them. This synoptical analysis may therefore be adopted as part of this judgment to such extent as may be required.

According to this body of evidence all the appellant-accused were concerned in a conspiracy for waging war against the Queen, and this conspiracy was carried into action, in the course of which death was caused to one of the Queen's soldiers and severe wounds to one of Her military officers, while several other of Her subjects were wounded, one of them to danger of life.

On this evidence the accused-appellants, twelve in number, have been convicted under section 121 and sections 302 and 149, Penal Code, and have been sentenced to death.

The Government Prosecutor explains that section 149 was introduced into the charge as a precaution in the event of the major accusation failing to be made out.

There seems to be nothing of special importance in the appeals of the accused, and it is not quite clear whether all of them mean to challenge the conviction as well as the sentence.

The case is peculiarly free from doubt or complexity of any kind in regard to the facts or the evidence. There is suspicion of an accomplice taint about some of the witnesses, but it does not go deep, and anyhow there is plenty of corroboration.

None of the witnesses have been discredited in any material particular, and no good reason appears for distrusting them.

On the evidence alone, without confessions, there is ample material for conviction.

The appellants have produced some evidence in defence, but there is nothing in it to the point.

Seven of them bear in their own bodies the proof of their guilt in the shape of the wounds inflicted in the fight which occurred. These wounds, mostly from gun or pistol, are such as men do not commonly receive in the peaceful pursuits of life, and their presence has to be accounted for, and it is accounted for in no other way than that of the rebel fight.

The existence of these wounds is not only conclusive against the men who bear them, but is strongly corroborative against the remaining men who escaped without bodily injury.

The number of men who are proved to have taken part in the conflict also goes to show that the uninjured accused also had a share in it.

Besides all this, there are the confessions of the appellants. The appellants withdrew their confessions for the most part under the excuse that they were the outcome of force or menace, but they gave no definite particulars that could be tested and they tendered no evidence in support of the bare allegation, which is of the kind almost invariably put forward as a last resource.

The confessions bear all the intrinsic marks of genuineness, and it seems almost impossible that the accused, or at least those who

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confessed first, could have learnt what they disclose otherwise than from personal knowledge in respect of matters to which British Officers and Indians, and not Burmans, were witnesses. And then, again, the accused who was acquitted did not confess.

The assessors, the correctness of whose assistance at the trial is open to doubt, but which assistance was, if anything, an advantage to accused, accepted the evidence without demur, rather a remarkable thing in a capital case in this country.

The essential facts, which are perfectly simple, are thus clearly established by the evidence of the witnesses and the confessions of the appellant-accused.

A man who was a Buddhist monk, or who had assumed the garb and character of one—an easy matter—is shown to have entertained for some time the design of making himself master of the country. As has been done over and over again, he made out that he was a being in process of development into a sovereign prince and in possession of miraculous powers.

For a period he was lost to view, but a few months ago he reappeared, his fame was noised abroad, and numbers of people visited him.

In September or the beginning of October the monk's plans began to take definite shape, and men were invited to join him as adherents. His object was plainly to overturn the British rule and to set up his own authority in its stead.

A certain number of persons listened to his persuasions, and one evening a band of eighteen, or twenty or more persons was collected, armed with *das* and clubs and two spears, and with this body of men he marched through the town from the south to the north, a distance of two or three miles, as far as the gate of the fort or walled city, in the centre of which is the former royal palace, where the monk intended to establish himself as king.

It was in contemplation to procure firearms either at the palace or by an attack on some military police-station on the way.

At the bridge crossing the moat to the gate the band came up with a British soldier, unarmed apparently, with a woman, supposed to be his wife, walking by his side. These persons were reported as the enemy, and orders were given to cut them down. They were thereupon attacked from behind, slashed and hacked with *das*, and fled shouting and screaming inside the gate, near which are situated the quarters of some of the officers of the garrison. The alarm brought to the rescue first one British Officer, and then others, and a fight took place with the band, in attack and in retreat, in the course of which the monk and three other men were killed, and a number of others were wounded.

The soldier had one of his hands cut off, and died within a week, death being a natural consequence of his injuries, while the woman recovered, but narrowly escaped death. Other persons were wounded also.

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From these circumstances there can be no doubt that the act of the monk and of those jointly concerned with him in the transaction was the raising of an insurrection against the Queen's Government and the waging of war against the Queen within the meaning of section 121 of the Penal Code.

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It is also clear that murder was committed in carrying out the operations.

Every one who took part in these proceedings, voluntarily and in pursuance of the common object, was guilty of an offence under section 121 and of an offence under section 302 of the Indian Penal Code.

The only perplexing thing about the affair is its extraordinary character.

To the Englishman, with his knowledge of the might and resources of his country and his assured confidence in its military power, the whole enterprise and the inadequacy of the means to the end must appear absolutely insane.

But to the eyes of ignorant and overweening Burmans the disparity and desperation would not be manifest.

Though the conspirators had only *das* to begin with, they counted on obtaining better weapons as they went on. There is some indication of the contemplated co-operation of a second body of men on another side of the fort. Even some slight momentary success was likely to bring those who held aloof at first to the insurgent standard. The passive assistance and the sympathy of the general mass of the people could be reckoned upon. And the ramifications of the plot may, as there is something to suggest, have been more extensive than has been disclosed on the surface. It would appear that the final act was somewhat premature and precipitate, owing perhaps either to the monk's uncontrollable impatience or to his superstitious preference for a propitious day.

Some matters have been left in an obscurity which it is hard to believe could not have been removed, at least in some measure, by certain of the witnesses if they had chosen.

The police were in touch with what was going on through one of the principal witnesses, and although the intention to commit the outbreak was communicated to the police on the day of its occurrence, nothing appears to have been done by way of precaution to prevent the grave consequences which followed.

The rebels marched through the town in an armed body without interruption, and without challenge till almost the last moment.

The resort of many people to the monk, who was ringleader, seems to have been notorious, but no notice of it was apparently taken by the police, and the reason is not shown by the proceedings, which are somewhat bald in connection with the point.

Under such circumstances, the disastrous result of the insurrection, although it would seem a foregone conclusion to the calm and judicious

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bystander, would by no means be similarly apparent to the insurgents themselves. And indeed the forlorn hope has sometimes received the crown of success.

When Thebes was recovered by Pelopidas after the seizure of the citadel by the Spartans in the height of their military supremacy, the average Greek would doubtless have been disposed beforehand to regard his enterprise as wild and hopeless.

But besides mere worldly considerations, the rebels were animated by confidence in magical or supernatural help. They believed that their lives were shielded and their strength indefinitely augmented by the monk's exercise of celestial power, which was among his possessions.

That faith of this kind is firmly and sincerely held by the people of Burma at large is well known to everyone acquainted with them and their modes of thought; its existence is displayed in the revered books of the *Dhammathats* and other works; and concrete examples are given in the Printed Judgments of this Court of the current year under the head Penal Code, 304, in connection with snake-charming and other matters.

It is not easy for the man of ordinary intelligence and average education, saturated, more or less unconsciously, with the opinions of the latter part of the nineteenth century, to realize the attitude of mind which notions such as those prevalent in Burma produce.

Though the Englishman and the Burman are living side by side in the same country, there is between their minds a great gulf fixed. I should have been inclined to express the width of that gulf in centuries were it not that I recall to recollection such circumstances as that, in 1666, Lilly was summoned before a Committee of the House of Commons to explain his astrological predictions of the Great Plague and the Great Fire of London; that a witch was burnt in Spain in 1781, or not much more than a hundred years ago; and that only the other day, so to speak, peasants in Ireland were convicted of torturing and, I think, killing a supposed witch. But at any rate there has been a great advance of opinion with respect to such subjects in recent times.

The great difference between the Englishman and the Burman is that the former requires proof and the test of experience for his practical beliefs, while the latter does not, and though the matter may be thus shortly stated, it involves a vast difference in the question now under consideration.

There was apparently some doubt felt as to the sanity of the deceased monk, but no such scruple deterred the men who followed him from putting trust in his pretensions and assurances.

In dealing with a case of this sort it is impossible not to be affected with the same kind of compassionate toleration that one would feel for the folly of a child which had led it into disobedience and mischief. But even children must be chastised for the sake of themselves and others.

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The enterprise of the appellants was most mischievous and dangerous to the public welfare. If it had not been accidentally checked at the threshold, it might have done very serious harm. The ferocity of the attack on innocent and inoffensive people is a symptom of the savage excess which would have attended temporary success, and there is no sign of any redeeming or mitigating element anywhere in the conduct of the rebels. In the punishment of offences like the present there seems to be no reason for departure from the principles enunciated in the case of the Chaungu rebellion—Criminal Appeal No 136* of 1894.

Of the appellants, the first Nga Kaing, the fourth Nga Te, and the twelfth Nga Pe Te, were perhaps the most prominent of the survivors of the rising, and next to them the second Nga Myaing, the third Nga Yan Gyi and the fifth Nga Chet, but it is hardly possible to

* The Sessions Judge has passed sentence of death on the first accused Nga Paung, the pretender, as there are no extenuating circumstances in his favour, and on the second accused Nga Kaung, who, in addition to attacking the police-station, "deliberately attempted to murder a British officer who was in command of the party sent out to arrest the rebels."

As to the other accused the Sessions Judge observes : "The majority of the accused now before the Court are mere lads, who were probably duped by false promises and promises made by the leading members of the gang. There can be no doubt that these young men have committed a crime of the gravest nature, but in passing sentence on them I take into consideration the fact that they were influenced by older men, and that very possibly they did not realize the gravity of the offence."

These reasons do not seem to me to be sufficient for the distinction of punishment that has been made, and I have consequently called on these accused to show cause why the sentence should not be enhanced.

In this Court it has been suggested by the learned Counsel for the Crown that if mercy should be shown to any of the accused, it might be on account of their youth and insignificance as mere rank and file, and that those most deserving of the maximum penalty are those such as the third, fourth and ninth accused, who seem to have had a longer and closer connection with the pretender than the others.

No doubt some of the accused are greater offenders than the others because of their position as leaders and contrivers of the rebellion. But the proper point of view seems to be to consider what punishment would be deserved by the accused generally, supposing them to be on an equality. They all promoted an insurrection in which arms were used, in which the probable result was that the death of some persons would be caused, and in which, as a matter of fact, the death of three persons was caused, in the case of two of whom at least such killing was murder.

The Sessions Judge correctly calls the crime "one of a most heinous description." There was not only the destruction and suffering actually caused, but there was the prospect of very much more being caused afterwards, particularly after the rebels had procured firearms. The rising, but for the want of firearms in the first instance and but for its prompt and speedy repression, might have inflicted incalculable injury and misery on a multitude of innocent people.

When the country was in a disturbed state, and no man could feel quite sure on

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make a positive distinction. Every man, of course, when he is in the situation of appellants, gives the foremost place to his comrades and the furthest back to himself. If any clemency is to be shown, the matter is one for the authorities, who are in a position to know what amount of indulgence is safely compatible with the state of the country.

Apart from any moral or political standard, and estimating the gravity of the offence solely by means of the judicial weights and measures with which a Court of Justice has to do, I find that the punishment of all and each of the appellants is deserved, and I see no sufficient ground for questioning the propriety of the sentence in any instance.

The appeals of all the accused-appellants must therefore be dismissed.

which side to show himself with safety to his own life, the Courts were necessarily compelled to deal with offences under Chapter VI of the Penal Code with all possible leniency. But conditions have greatly changed since the first few years after the annexation. The country has for a long time enjoyed perfect security and tranquillity under a firmly settled and strongly established Government, capable of affording full protection to life and property, and attempts to disturb that state of things with such feeble and incompetent means as those in the present instance are extremely wicked and cruel. When such futile attempts are made, the truest mercy to the people at large any way is probably, as suggested by the learned Counsel for the Crown, to inflict an exemplary sentence, which will stop similarly idle and mischievous enterprises in future. I consider therefore that the Court of Session was not justified in making the distinction it has done and in reducing the sentence on the majority of the accused to transportation for life. A capital sentence is the most appropriate and is by no means too severe for the offence committed.

If there is room for clemency on account of the youth of any of the accused, or because of their want of influence and importance, the matter is for the consideration of the Crown in the exercise of its prerogative of mercy. The duty of the Courts of Justice is to pass the sentence which the judicial requirements of the case point out. This duty, I think, the Court of Session ought to have discharged, and it is not convenient nor expedient that it should be thrown on this Court. The sentence can, however, be enhanced on appeal under the provisions of the Criminal Justice Regulation. But if this were not so, it would have been necessary to proceed under the court's power of revision.

It has to be considered whether, if the maximum sentence had been passed on all the accused in the first instance, as it appears it ought, there would be any reason for reducing such sentence in appeal in the case of any of the accused appellants.

After full consideration of the case, I am unable to find any reason which would be sufficient for such reduction on judicial account. Anyone who took part in the insurrection as it was carried out is, in my opinion, deserving of capital punishment, unless there are special circumstances which would render his individual offence less grave than that of the rebels as a body. The circumstance that some of the rebels were worse criminals than others would not be a sufficient reason for a reduction of sentence merely for the sake of making a distinction. If any of the accused had withdrawn from the enterprise before it was put into effective execution, or had otherwise shown signs of repentance or contrition, there might have been cause for mitigating the punishment in their favour. But this does not appear to have been the case with respect to any of the accused. * * *

 Penal Code—141—143.

 Penal Code—141—143.

Before H. Thirkell White, Esq., C.J.E.

ISMAIL, NGA THA KYU, NGA SAN BWIN, NGA TUN, AND NGA
LAT v. QUEEN-EMPRESS.

Mr. H. M. Hirjee—for applicants. | Mr. H. M. Lütter—for the Crown.

Penal Code 141, 143—Unlawful assembly, what constitutes—Criminal force.

Criminal Revision
No. 520 of
1899.
July
10th.

The only question for consideration is whether on the evidence the Magistrate was justified in holding that the common object of the applicants was to enforce a right, or supposed right, by a show of criminal force, or by criminal force if necessary. After reference to various authorities in which the meaning of the term unlawful assembly has been discussed it was—

Held—that there was not sufficient ground for the conclusion that the common object of the accused was to effect their object by force, or show of force, and that they were not shown to have constituted an unlawful assembly.

References:—

I. L. R., 16 Cal, 206.

Encyclopædia of the Laws of England, I, 343.

Mew's Digest of English Case Law, IV, 1676.

THE applicants have been convicted of being members of an unlawful assembly under section 143, Indian Penal Code. The Magistrate has found that they, with others, took a wagon loaded with timber along a railway siding to a place opposite the saw-mill of the complainant, Sayyad Ismail, and there unloaded it. He has held it proved that the party of which the applicants were members numbered about 20; that they continued to unload the wagon, though ordered by a Head Constable to desist; that there were a number of sticks on the wagon; that the complainant believed that he would be beaten if he interfered personally; and that the common object of the applicants was to enforce the right of their employer to deliver timber at or near the complainant's mill by a show of criminal force. The grounds on which is based the finding as to the common objects of the applicants are that 20 men are more than sufficient to unload the wagon, and that the sticks on the wagon were evidently intended to be used as weapons if any resistance was offered. It is admitted that no violence was used or offered and that no threats were uttered. The applicants peaceably brought the timber, placed it on the ground, and went away.

The question which arises is whether the applicants were members of an unlawful assembly as the Magistrate has found them to be.

An unlawful assembly is defined in section 141 of the Indian Penal Code. So much of the definition as concerns this case is as follows:—
"An assembly of five or more persons is designated an 'unlawful assembly,' if the common object of the persons composing that assembly is * * * by means of criminal force, or show of criminal force, to any person * * to enforce any right ors opposed right."

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The only question for consideration in this case is whether, on the evidence, the Magistrate was justified in holding that the common object of the applicants was to enforce a right or supposed right by a show of criminal force or by criminal force if necessary.

In order to assist in the consideration of this question it will be useful to refer to cases in which the meaning of the term unlawful assembly has been discussed.

In the case of *Ganouri Lal Das v. Queen-Empress*,* in describing the acts of a party of men who were assembled for the purpose of asserting their right to repair a bund, the learned Judges observed:—

“The District Judge finds that they were not more in number than was necessary for the purpose of repairing the bund, for which purpose they went; that they did not go to fight; that they did not go armed and ready to use force; and that they did not use force on this occasion.

“Upon these findings, it follows that the acts of the Thakurs' party did not constitute an offence under the Indian Penal Code.”

In the same judgment the following passage occurs:—

“Dalton's Justice of the Peace, in a passage constantly cited * * * pages 445, 446, Chapter 137: ‘Every man in peaceable manner may assemble a meet company (and may come) to do any lawful thing, or to remove or cast down any common nuisance done to them. Every private man, to whose house or land any nuisance shall be erected, made or done, may in peaceable manner assemble a meet company with necessary tools and may remove, pull, or cast down such nuisance and that before any prejudice received thereby; and for that purpose if need be, may also enter into the other man's ground. A man erects a weir across a common river, where people have a common passage with their boats, and divers did assemble with spades, crows of iron and other things necessary to remove the said weir, and made a trench in his land that did erect the weir, to turn the water, so as they might the better take up the said weir, and they did remove the same nuisance. This was holden neither any forcible entry nor yet any riot.

“But in the cases aforesaid, if in removing any such nuisance the persons so assembled shall use any threatening words (as to say they will do it in spite of the other, or they will do it though they die for it, or such like words), or shall use any other behaviour in apparent disturbance of the peace, then it seemeth to be a riot, and therefore, where there is cause to remove any such nuisance, or to do any like act, it is the safest not to assemble any multitude of people, but only to send one or two persons, or if a greater number, yet no more than are needful and only with meet tools, to remove, pull, or cast down the same, and that such persons tend their business only without disturbance of the peace or threatening speeches. For the manner of doing a lawful thing may make it unlawful.’”

* I. L. R., 16 Cal., 206.

Penal Code—141—143.

English rulings which seem to bear on the point may be cited. In *Reg. v. Graham* * it was said:—

"An unlawful assembly is an assembly of persons with the intention of carrying out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such a assembly ground to apprehend a breach of the peace in consequence of it." This definition is partially adopted by Stephen.†

Again, in *Rex v. Hunt*: ‡ "An assembly of great numbers of persons, which, from its general appearance and accompanying circumstances, is calculated to excite terror, alarm and consternation, is generally criminal and unlawful."

It has been said that "any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the King's subjects, seems to be properly called an unlawful assembly."§

I have cited these passages bearing on the English law on the subject in order to obtain assistance in interpreting the expression "show of criminal force" as used in section 141 of Indian Penal Code. I think it may reasonably be held that if more than five persons assemble for any of the purposes stated in the fourth and fifth clauses of the above section in numbers far beyond that required for their lawful purpose, and if by their acts or words they indicate the intention of using criminal force in order to effect that purpose, these persons may reasonably be held to constitute an unlawful assembly within the definition. If they are armed or if they have placed arms at hand for use if necessary, the application of the definition would be still more obvious.

It remains to apply these principles to the case under consideration. The Magistrate finds it proved that a party of men numbering about 20 took a wagon and unloaded it. He observes that 20 men are far more than a sufficient number to peaceably unload the logs. But what is the evidence on this point? The complainant says there were about 20 men with the second accused, including the four last-named applicants, and two men who have been acquitted, and that the Head Constable called all the accused away with him. Mr. Craker, the second witness, saw the wagon returning with 12 or 14 men. The Head Constable does not mention the number of men present, but he says that all of them went away with him. No question seems to have been asked of any of the witnesses as to whether there were more men present than necessary for the unloading, and it is not suggested that any of the men did anything else but unload, or that they were not all

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* 16 Cox C. C., 420, cited in Mew's Digest of English Case Law, IV, 1676.

† Dig. Cr. L., Art. 75, cited in Encyclopædia of the Laws of England, I, 343.

‡ 1 Russ. C. and M., 570, cited in Mew's Digest of English Case Law, IV, 1676.

§ 1 Hawk P. C. c. 28, s. 4, subs. 9, cited in Encyclopædia of the Laws of England I, 343.

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engaged. The fact that there were 20 men present rests entirely on the evidence of the complainant. The Head Constable was in a position to know exactly how many were present and even to give their names. Yet out of 20 alleged to have been present only five have been convicted and only seven were brought into Court. I think some allowance must be made for exaggeration on the part of the complainant. In my opinion it is not proved that there were about 20 persons with the truck; or that there were more than were required for the unloading. As regard the sticks there is only the evidence of the Head Constable. The sticks do not seem to have been produced and I think there is not sufficient reason to infer that they were intended to be used as weapons. The fact that the accused behaved in a perfectly peaceful manner and used no threats or violence is in their favour.

On the whole I am unable to see that there is sufficient ground for the conclusion that the common object of the accused was to effect the unloading by force or by show of force; and I do not think that they are shown to have constituted an unlawful assembly.

The convictions and sentences of the five applicants, Ismail, Tha Kyu, San Bwin, Nga Tun and Nga Lat, are reversed and it is directed that they be acquitted and that their recognizance bonds be cancelled. The bonds, if any, executed under section 106, Code of Criminal Procedure, become void under section 106, sub-section (2).

Penal Code—161—109.

Penal Code—161—109.

Before G. D. Burgess, Esq., C.S.I.

NGA PU GAUNG v. QUEEN-EMPRESS.

Criminal Revision
No. 324 of
1897.
May
6th.

Penal Code, ss. 161, 109—Illegal gratification—Abetment—Accomplice—Extortion.

The accused was convicted and sentenced to three months' rigorous imprisonment on the following findings, and the conviction and sentence were upheld in appeal under section 161, Penal Code:—

"*Maung Pyu U states*:—On the 14th waning *Tagu* the accused came to Tagundaing and asked by whose orders certain villagers were cutting up timber. He was informed by orders of the Subdivisional Officer, Public Works Department. He informed them that if they wished to continue sawing up this timber, he must be paid. This witness collected Rs. 2 from Maung Po Maung, Maung Kye, Shwe In and Maung Ka, which, with Rs. 2 from himself, made Rs. 10. This sum was paid to Maung San Ke, who handed it over again in witness's presence to Maung Ke. At this time Maung Pu Gaung was a forest guard in the employ of the Forest Department.

"All witnesses for the prosecution give corroborative evidence on these points. The second witness, after corroborating the main fact, stated that he collected Rs. 10 from Maung Tha Maung, Maung Aung Ban, Maung Kwin Gyi and himself, and made this sum over to Maung San Ke, whom he saw give this money to Maung Kye. Maung San Ke, fourth witness, states, on Maung Pu Gaung's instruction, he paid this money to Maung Kye, who paid it again at the village gate to the second accused, who accompanied Maung Pu Gaung. Maung Kye, fifth witness, states he received Rs. 28 from Maung San Ke, being the money which was collected from sawyers; he then went to the village gate with the second accused and paid him over this sum. This was in accordance with Pu Gaung's instructions, who said two witnesses were to be present. The money was paid to second accused under the gateway of the village.

"The following witnesses testify to seeing Maung Kye go with and hand over the money to Maung Kyaw San under the gateway:—second, third, and sixth.

"Maung Pu Gaung states he never received Rs. 28 from the villagers. The second accused was not his servant. He had these villagers fined last May and they bring this case on him out of malice.

* * * *

"The accused Maung Pu Gaung stopped the work and demanded money before the villagers were permitted to continue sawing up the timber. This timber was being sawed up without any license and the accused took Rs. 28 as a gratification to forbear from reporting this circumstance to the Forest Office and from stopping all work until a license was granted.

"The first accused says this case is brought through malice because he had the villagers fined in May. Mr. Allen, who watched the proceedings for the Forest Department, states this is untrue and the accused has made no attempt to prove this statement."

* * * *

Application was made for revision on the ground, among others, that the witnesses for the prosecution were, on their own showing, accomplices.

Held,—that even if the witnesses were accomplices, there would be corroboration in the circumstance that the accused took no proceedings against them for their breach of the Forest Rules in cutting up the timber, but that they were probably not accomplices, the offence committed being almost certainly extortion, the accused dishonestly holding out an implied threat of a criminal prosecution, which would be an "injury" under section 383, Penal Code, or of some other harm, to induce payment of money to him.

Application dismissed.

Penal Code—161—109.

NGA PU GAUNG
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QUEEN-EMPRESS.

THIS case has not been tried so carefully as it might be considering the points raised by the defence, but after allowing for this, I do not see that there is enough to render interference in revision requisite.

The applicant-accused had an opportunity of producing evidence and he produced none to show that the villagers owed him a grudge on account of his prosecution of them for another offence, and he could not have been so ignorant as not to know the importance of making that point out.

The witnesses are objected to as accomplices, but the offence committed was almost certainly extortion. There is authority for holding that "injury," even after the definition in section 44 of the Penal Code includes the injury of the threat of a criminal prosecution whether on true or false grounds—7 W. R., Cr. R., 28, and see sections 388 and 389. The accused's alleged action amounted to making a threat of that kind, and if he did not mean that, then he meant some harm which he had no legal right to cause at all, such as the stopping of the work of cutting up timber.

But even if the witnesses were accomplices, there would be corroboration in the circumstance that the accused took no proceedings against them—for this is to be presumed from his own silence—for their breach of the Forest rules in cutting up the wood.

If the evidence can be accepted, it makes it certain that accused committed the offence, for the payment of the money is proved by eye-witnesses, and it is of no consequence that the payment was not made into his own hands when it was made into the hands of the person designated by him.

The only incredible thing is his alleged prohibition of payment before witnesses in the presence of more than one person, which is an inconsistent sort of story, but the difficulty about this is not sufficient to bar belief as to the substantial correctness of the testimony as a whole.

The application for revision must be dismissed.

 Penal Code—170.

 Penal Code—170.

Before H. Adamson, Esq.

QUEEN-EMPRESS v. NGA PO SAUNG.

Penal Code, 170,—Public servant, Personation of—Petition-writer.

The accused was convicted of personating a public servant, a petition-writer, under section 170, Indian Penal Code, and was sentenced to six months' rigorous imprisonment.

Held—that the conviction was clearly unsustainable, as a petition-writer is not a public servant as defined in section 21, Indian Penal Code.

Reference,—

Para. 5, U. B. C. M.

ACCUSED has been convicted by the District Magistrate of Meiktila of personating a public servant, to wit a petition-writer, under section 170, Indian Penal Code, and has been sentenced to rigorous imprisonment for six months. It appears that accused accompanied the Wundwin Myoôk on tour, and at a place, Kokosu, fifteen or twenty miles from the Myoôk's headquarters, wrote several petitions for hire that were presented to the Myoôk. He had formerly applied for a license as a petition-writer, but it had been refused.

The conviction is clearly unsustainable. A petition-writer is not a public servant as defined in section 21, Indian Penal Code.

A breach of the rules for petition-writers made by the Judicial Commissioner * is punishable under section 30 (2), Upper Burma Civil Courts Regulation. But a breach of them was not committed in the present case, as in accordance with Rule 4, Rule 2 does not apply to petitions presented on tour at places where no licensed petitioner is practising. A similar exception is made with regard to petitions on the revenue side in Rule 245 of the rules under the Upper Burma Land and Revenue Regulation. In the present case the petitions in question were revenue petitions. There was therefore no breach of either law or rule by the accused.

The conviction and sentence are set aside.

Criminal Revision
No. 465 of
1899.
May
8th.

* Para. 5, U. B. C. M.

 Penal Code—186.

 Penal Code—186

Criminal Revision
No. 673 of
1901.
October
24th.
 —

Before G. W. Shaw, Esq.

KING-EMPEROR *v.* NGA THA DIN AND NGA WET GYI.

Mr. H. M. Lütter, Government Prosecutor—for the Crown.

Obstructing public servant in discharge of public functions—Obstruction must be intentional and direct.

The accused were convicted under section 186, Indian Penal Code, for removing from the village of Aungtha some hides of cattle that had died of rinderpest in spite of the prohibition of the Veterinary Assistant. The Magistrate held that in taking the hides away in these circumstances the accused were guilty of voluntarily obstructing a Government servant (the Veterinary Assistant) in the discharge of his public functions.

Held,—that to constitute an offence under section 186, Indian Penal Code, the obstruction must be intentional and it must be direct. As the Veterinary Assistant had no authority to forbid the taking away of the hides this could not constitute an offence under section 186, Indian Penal Code.

References,—

Mayne's Indian Penal Code, section 186.

I. L. R., 15, Mad., page 93.

THA DIN and Wet Gyi have been convicted by the Subdivisional Magistrate, Taungdwingyi, under section 186, Indian Penal Code, and sentenced the first to a fine of Rs. 25, or in default 15 days' rigorous imprisonment and the second to a fine of Rs. 5, or in default three days' rigorous imprisonment. Their offence was removing from the village of Aungtha, Myothit township, in spite of the prohibition of the Veterinary Assistant, some hides of cattle that had died of rinderpest.

The Magistrate held that in taking the hides away in these circumstances the accused were guilty of voluntarily obstructing a Government servant (the Veterinary Assistant) in the discharge of his public functions.

The learned Government Prosecutor argues that as it was the duty of the Veterinary Assistant to do all in his power to prevent the spread of cattle-disease and therefore to prevent the hides from being taken away, the accused, if they conveyed the hides away, obstructed the Veterinary Assistant within the meaning of section 186.

It is admitted that the village headman was present. In the complaint the Veterinary Assistant stated that he and the headman forbade the removal of the hides. But the evidence did not show that the headman issued any order or made any prohibition.

The proper procedure of course was for the headman to issue the necessary orders in the exercise of the powers conferred upon him under the Village Regulation and the rules made under it. The accused could then have been prosecuted and convicted under section 8 of the Village Regulation.

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This cannot be done now, because the Veterinary Assistant took it upon himself to issue orders which the headman ought to have given and the headman chose to neglect his duties under the Regulation in this matter.

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NGA THA DIN.

But these facts will not make the accused guilty under section 186, Indian Penal Code, unless what they did amounts to voluntarily obstructing a public servant in the discharge of his public functions.

I am of opinion that the conviction cannot be maintained. To constitute an offence under section 186 the obstruction must be intentional, and it must be direct.

Mayne, under section 186 of his edition of the Indian Penal Code, gives some instances where the section has been wrongly applied.

It has been held that a public servant is not discharging his public functions when he is doing or ordering something which is wholly beyond his jurisdiction.

It has been held that a person who refused to hire his cart to a Government servant was not legally convicted of voluntarily obstructing the public servant in the discharge of his public function; that a man who escapes from lawful custody, or who shuts himself up in his house and refuses to open to a commissioner despatched by a court of justice, is not punishable under this section.

Again, it has been held that to circulate reports or to actively dissuade persons from bringing their children to a public vaccinator to be vaccinated is not an offence under section 186.

The last case that of *Reg. v. Thimmachi** perhaps comes nearest the present case.

But here all that the accused did was to go quietly away, taking the forbidden hides with them. As the Veterinary Assistant had no authority to forbid the taking away of the hides, I do not think this can be held to constitute an offence under section 186, Indian Penal Code. The Veterinary Assistant's public functions consisted of treating diseased cattle, advising owners and above all assisting the headman by his advice, and apart from the authority of the headman he could do nothing unless the persons concerned voluntarily submitted to follow his directions.

The convictions and sentences are set aside. The fines will be refunded.

* I. L. R., 15, Mad., 93.

 Penal Code—188.

 Penal Code—188.

Before G. D. Burgess, Esq., C.I.E.

Criminal Revision
No. 615 of
1897.
August
24th.

QUEEN-EMPRESS v. MAUNG PO THIN AND TWO OTHERS.

Mr. H. M. Lütter, Government Prosecutor,—for the Crown.

There are no provisions of law in Burma conferring upon District Officers general authority to make orders forbidding cart traffic on public roads which the people have been in the habit of using for the passage of their own country conveyances.

Therefore an order issued by a Deputy Commissioner forbidding carters to drive their carts on a public road for the space of six months and threatening those who should disregard it with arrest was ultra vires, and a conviction and sentence under section 188, Indian Penal Code, for disobedience of the order were quashed as illegal.

The Deputy Commissioner of the district made and promulgated an order to the following effect :—

“No carts are allowed on this road for six months ; the owners of carts found driving on the road before the first *lasan* of *waso* will be arrested and prosecuted.”

Information was laid by the Police against the accused, who had been found driving their carts on the road within the prohibited period, but some time after the road had been repaired, in the Court of the Subdivisional Magistrate, who before entertaining the case asked for the Deputy Commissioner's orders reporting “I think the order mentioned by the Police Sergeant of Salingyi was only in force for the time that the Satôn-Kyadet road was under repairs. This road has been repaired some time ago and I think it is hard for carts not to use it, when they have no other road besides this between these two stations.”

Nevertheless the Deputy Commissioner directed a prosecution, and the Subdivisional Magistrate tried the accused summarily and convicted and sentenced them to a fine of Rs. 3 each for disobedience of the Deputy Commissioner's order as punishable under section 188, Indian Penal Code.

In the Subdivisional Magistrate's judgment the accused were shown as pleading guilty, although under the entry of “examination of the accused” the Magistrate had recorded “the three accused admit that they drove their carts on the Satôn-Padu road, but state that they were not aware that an order prohibiting the use of this road had been issued.”

The District Magistrate was called on for report, and the case was eventually argued in revision by the Government Prosecutor.

Held,—that there were no provisions of law relating to Burma conferring upon District Officers such general authority as the Deputy Commissioner had assumed, and consequently the order that he issued was *ultra vires*, and the conviction and sentence under section 188, Indian Penal Code, for disobedience of that order illegal.

The powers and duties of public officers with respect to public roads in general did not seem to be laid down by law in India, and though as the administrative head of a district a Deputy Commissioner would naturally have some sort of executive control over public roads and would be charged with their protection and maintenance, any authority he might have in this way would of course have to be exercised in accordance with ordinary legal principles.

In England the common law relating to Highways had been largely replaced or supplemented by statute. There were the Highway Acts of 1835 (5 and 6 Will. IV) 1862 and 1864, the Public Health Act, 1875, the Highways and Locomotives (Amendment) Act, 1878, and the Local Government Act, 1894, and others. Ex-

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cepting municipal and purely local enactments there had been no similar legisla-
tion in India.

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v.
MAUNG PO THIN.

In England the rights of the public in a highway were jealously guarded, and a highway could not be stopped up, diverted, or turned except in compliance with elaborate provisions for their protection (*vide* Highway Act, 1835, sections 84—92).

Although so many precautions as those taken in England might not be requisite in this country, where there was not the same local organization, it appeared proper that the important principle involved, namely, that a public right-of-way should not be meddled with save for the public benefit, should be carefully preserved.

In England, it had been said—"It is an established maxim, once a highway always a highway, for the public cannot release their rights and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are either by the old writ of *ad quod damnum*, or by proceedings before Magistrates under the statute" (*vide* Dawes v. Hawkins, 8, C. B. N. S., 858).

When powers were given by statute to interfere with an existing road provision was made for substituting another (*vide* Railway Clauses Consolidation Act, 1845, section 54).

What happened in this country when the improvement of a road was undertaken by the Public Works Department generally was that the old line of road was followed so far as might be, but was straightened where possible, that embankments were raised over low ground, that bridges or culverts were constructed, and that metal was laid down where the ground was soft, and so forth. Until the new road-way was consolidated and hardened, carts or at least carts with Burmese wheels had to be kept off it, but when this was done a track for carts was provided along the berm or elsewhere.

But in the present instance the Subdivisional Magistrate in his report to the Deputy Commissioner expressly stated that the road was repaired some time ago and that there was no other road for carts between the two stations besides this.

The prohibition of traffic in this case was therefore a particular hardship, to say nothing of its interference with ordinary public rights.

Furthermore, there was nothing to show that the passage of the carts caused or was likely to cause obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury to any persons lawfully employed, so that on this ground alone the proceedings were bad and would have to be quashed.

Held,—accordingly, that the order in question was without authority, besides being unreasonable, and that the conviction for disobedience of such order under section 188, Penal Code, was bad in law.

Conviction and sentence quashed.

References.

Archbold's Pleading and Evidence in Criminal Cases—Nuisances to Highways.

Bombay Regulation, XII of 1817, s. 19.

Dawes v. Hawkins, 8, C. B. N. S., 858.

Harrison v. The Duke of Rutland, L. J. R., 622, B. D., 117.

Highway Act of 1835 (5 and 6, Will. IV) ss. 84—92.

————— 1861.

————— 1864.

Highways and Locomotives (Amendment) Act, 1878.

J. D. Circular No. 10 of 1893 of the Local Administration.

Local Government Act, 1894.

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Public Health Act, 1875.
Railway Clauses Consolidation Act, 1845, s. 54.
Russell on Crimes (5th Edition), Vol. I, p. 453.
Smith's Leading Cases (10th edition), Vol. II, p. 165.
Dovaston v. Payne.
———II, p. 169.
15, W. R., 46.
20, W. R., 293.

THE accused in this case were tried summarily by the Subdivisional Magistrate and sentenced to a fine of Rs. 3 each for "disobedience of the Deputy Commissioner's order, punishable under section 188, Indian Penal Code."

The order disobeyed forbade cart traffic on a road for the space of six months, and threatened careters disregarding it with arrest.

The accused are shown as pleading guilty, but under the entry of "Examination of the accused" the Magistrate has recorded: "the three accused admit that they drove their cart on the Satôn-Padu road, but state that they were not aware that an order prohibiting the use of this road had been issued." How the Magistrate could record a plea of guilty upon this defence is not intelligible.

Before entertaining the case the Subdivisional Magistrate asked for the Deputy Commissioner's orders, reporting—

"I think the order mentioned by the Police Sergeant of Salingyi was only in force for the time that the Satôn-Kyadet road was under repair. This road had been repaired some time ago, and I think it is hard for carts not to use it, when they had no other road besides this between these two stations."

Nevertheless, the Deputy Commissioner directed a prosecution, and the Subdivisional Magistrate in convicting gave the following reasons for his finding:—

"I find the three accused guilty of the offence with which they are charged, as Babu N. C. Dutta, Sub-Overseer of the Public Works Department, has satisfactorily proved to the Court that ten copies of the order issued by the Deputy Commissioner prohibiting the use of the Satôn-Padu road had been placarded by him in conspicuous places some time ago, and he filed a copy of the order (Exhibit A). I do not believe that the three accused are ignorant of the order. I think they deserve a heavy fine so that it may act as a deterrent to other cartmen violating the order."

In revision by this Court of the proceedings the District Magistrate was called upon to report under what authority the order of prohibition of traffic had been promulgated, and what was the authority for the threat of arrest.

The latter question has been left unanswered, and it is hardly necessary to say that no threat of that kind should be made by a public officer unless he has the law at his back to make it good.

On the former point, the District Magistrate reported as below.

"With reference to the orders recorded by the Judicial Commissioner in his Criminal Revision Case No. 615 of 1897, dated the 19th June 1897, I have the

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honour to state that on the 23rd January 1897 the Executive Engineer, District, in his letter No. 182, asked me to assist him in keeping cart traffic off the newly metalled banks on certain roads during the dry season (copy of letter attached). At his request I issued the following notice in Burmese : "No carts are allowed on this road for six months the owners of carts found trespassing before the 1st *lasan* of *Waso* will be prosecuted." These notices were written in Burmese by the cyclostyle and were pasted on notice-boards that were fastened to the ground at each end of the part of the road that was to be protected. Please see Circular of the Local Administration No. 10 of 1893, regarding the prohibition of unauthorized traffic on roads. Under the circumstances, I do not think it necessary to instruct the Government Prosecutor to argue the case."

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In his letter to the Deputy Commissioner the Executive Engineer said—

"I have the honour to ask the favour of your giving me assistance in keeping cart traffic off the newly metalled banks on the following roads during the dry season :—

- (1) ————— road. | (2) ————— road.
(3) ————— road.

"There is now a good fair-weather road alongside of all banks, and it is quite unnecessary for carts to use the metalled portion.

"As soon as the rainy season sets in and the sides become heavy the notices can be taken down.

"This will be a saving to Government and a public benefit as it will give a better road for travelling when the rains set in.

"I would ask the favour of your letting me have 100 notices signed by you to put up on the banks where necessary."

The road which the accused have been punished for driving on is not mentioned in the above letter.

The Government Prosecutor has now appeared and argued the case. He has been instructed to support the conviction, but on the ground of the commission of trespass and mischief.

That however, would be making out a different case from that which the accused were tried for, and the discussion has had to be confined to the point at issue, namely, the propriety of the conviction under section 188, Penal Code.

With respect to this question, the difficulty is to know in what capacity the Deputy Commissioner was acting in closing the road to traffic, and he himself has not contributed much assistance towards supplying an answer.

It appears clear that the Deputy Commissioner could not have been acting as a Magistrate under the provisions of Chapters X and XI of the Code of Criminal Procedure.

There was none of the things mentioned in either of these chapters ; none of the conditions laid down was present ; and the procedure prescribed was not followed.

It is to be observed that an order under Chapter XI can remain in force for no more than two months, unless the time be extended by the Local Government by a notification in the Gazette.

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QUEEN-EMPRESS *v.* MAUNG PO THIN. The Deputy Commissioner's authority must therefore be sought elsewhere than in the Criminal Procedure Code, and both the learned Government Prosecutor and the Court have looked in vain for any statutory provision which would cover the Deputy Commissioner's action.

The powers and duties of public officers with respect to public roads in general do not seem to be laid down by law in India.

As the administrative head of a district a Deputy Commissioner would naturally have some sort of executive control over public roads, and would be charged with their protection and maintenance, but any authority he might have in this way would of course have to be exercised in accordance with ordinary legal principles.

In England the common law relating to highways has been largely replaced or supplemented by statute. There are the Highway Acts of 1835 (5 and 6, Will., IV), 1862, and 1864, the Public Health Act, 1875, the Highways and Locomotives (Amendment) Act, 1878, and the Local Government Act, 1894, and others. Excepting municipal and purely local enactments, there has been no similar legislation in India.

A great deal of the English law is taken up with the matter of the obligation to repair highways, to which there is nothing corresponding in this country.

Highway Act, 1835. When the duty of repairing a highway is neglected by the responsible person or local authority such as the parish, an indictment lies for the breach.

Archbold's Pleading and Evidence in Criminal Cases. Nuisances to Highways. Thus "nuisance, as far as relates to highways, is of two kinds—positive, by obstruction, and negative, by want of reparation."

The rights of the public in a highway are jealously guarded, and a highway cannot be "stopped up, diverted, or turned" except in compliance with elaborate provisions for their protection. There must be the approval of the inhabitants of the neighbourhood to the proposed interference; application must be made to two justices; notices must be published; a certificate must be granted by the justices and notified; and any person aggrieved by the notice has the right of appeal to quarter sessions. So many precautions may not be requisite in this country where there is not the same local organization as in England, but it appears proper that the important principle involved, namely, that a public right of way should not be meddled with save for the public benefit, should be carefully preserved.

In England it has been said: "It is an established maxim, once a highway always a highway; for the public cannot release their rights, and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are either by the Dawes *v.* Hawkins, 8, C. B. N. S., 858.

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old writ of *ad quod damnum*, or by proceedings before magistrates under the statute." QUEEN-EMPRESS
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MAUNG PE THIN.

Railway Clauses
Consolidation Act,
1845, section 54.

When powers are given by statute to interfere with an existing road provision is made for substituting another.

What happens in this country when the improvement of a road is undertaken by the Public Works Department generally is that the old line of road is followed so far as may be, but is straightened where possible, that embankments are raised over low ground, that bridges or culverts are constructed, and that metal is laid down where the ground is soft.

Until the new roadway is consolidated and hardened, carts or at least carts with Burmese wheels, have to be kept off it, but when this is done a tract for carts is provided along the berm or elsewhere.

But in the present instance the Subdivisional Magistrate in his report to the Deputy Commissioner expressly states that the road was repaired some time ago, and that there was no other road for carts between the two stations besides this.

The prohibition of traffic was therefore a particular hardship, to say nothing of its interference with ordinary public rights.

The common law of England is so careful of such rights that, it is said, "if a highway becomes so out of repair and foundrous as to be impassable, or even incommodious, the public have a right to go

Smith's Leading
Cases, 10th edition,
Volume 2, page
165.

Dovaston v.
Payne.

on the adjacent ground, whether it be cultivated or uncultivated"—1 Rolle's Abr. 390 A. pl. 1, B ple; 1 Hawk P. C. 76, s. 2; Young v.—1 Ld. Raym. 725; Absor v. French, 2 Show 28, pl. 19; Taylor v. Whitehead, Dougl. 745, 2 Wms. Saund. 161, n (12)."

If this had been a new road opened to traffic for the first time, traffic by carts with Burmese wheels or by all vehicles might have been forbidden.

Russell's on Crimes,
Volume 1, page 458 (5th
edition).
Smith's Leading Cases
11, 169.

"A dedication to the public may be in some respects limited or qualified, provided that the limitation or qualification be imposed contemporaneously with the dedication."

This is what is pointed out in the learned Government Advocate's opinion printed in Judicial Department Circular No. 10 of 1893, to which the District Magistrate has referred.

But no such restriction would apply to an old road, such as that in the present case, which the people had been in the habit of using for the passage of their own country conveyances.

The English law on this subject has been followed in India—20 W. R. 293, 15 W. R., 46.

Even if there had been a limited right of traffic only in this instance, it would not necessarily follow that action under section 188, Penal Code, was the proper action to be taken.

 Penal Code—188.

QUEEN EMPRESS

v.
MAUNG PO THIN.

The offence committed when a highway is wrongly used for a purpose for which it was not intended would apparently be trespass—see *Harrison v. the Duke of Rutland*, L. J. R. 622 B.D. 117 (1893), and the older cases.

If injury were done to the road, there would be the offence of mischief in addition.

If section 188 were applicable, then it would be necessary to know how the Deputy Commissioner was lawfully empowered to promulgate the order he issued, a thing which has not been shown.

I have examined the local Codes of Bengal, Bombay and Madras in vain for any provisions conferring upon District Officers such general authority as the Deputy Commissioner has assumed in this case. There is certainly no provision of the kind relating to Burma. When it is intended that a District Magistrate or other public officer should have special powers of control and of interference with respect to the usual rights of the public, such powers seem always to be conferred by express legislative enactment.

Thus Bombay Regulation XII of 1827 by section 19 enacts that it shall be lawful for the District Magistrate to institute rules respecting places of public resort when the public benefit and comfort are in question, and so when it is necessary to control the use of the public roads and streets by assemblies of people and processions, power to do so is explicitly given to the Superior Officers of Police by the various Police Acts; and the inference consequently is that to interfere with the free passage of the public on a public way without statutory provision in that behalf is *ultra vires*.

But even if it had been possible to show that the Deputy Commissioner's order was "promulgated by a public servant lawfully empowered to promulgate such order," it would still have been necessary to show besides at the least that disobedience of the order caused or tended to cause obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury to any persons lawfully employed under the first part of section 188, and under the second part of the section it would have been necessary to show yet more; whereas here nothing of the kind was proved, so that on this ground alone the proceedings are bad and would have to be quashed.

It has appeared desirable to look at this matter so far as possible from all points of view, since the present is no solitary instance of criminal proceedings concerning the user of highways, though it is not usual perhaps for action to be taken under section 188, Penal Code.

On the one hand, it is necessary to see that roads constructed by the State, that is, the property of the general public, are not recklessly injured by the thoughtless conduct of individual members of the public; while on the other it is equally necessary to guard against improper infringement of public rights and undue interference with their legitimate exercise, to see that reasonable measures are taken

Penal Code—188.

to provide for the inconvenience of temporary interruptions of the right of way, and to prevent the illegal punishment under colour of law of acts which are not really against the law.

The exercise of a little care and consideration ought to be sufficient for the attainment of both these objects at the same time.

~~The conviction and sentence are quashed~~

QUEEN-EMPRESS
v.
MAUNG PO THIN.

 Penal Code—202.

 Penal Code—202.

Criminal Revision
No. 819 of
1901.
October
24th.

Before G. W. Shaw, Esq.

KING-EMPEROR v. NGA THA DUN.

Request by a villager to the Ywagaung, to whom an offence has been reported, not to report the offence—not such an intentional omission to give information as is punishable under section 202, Indian Penal Code.

At the time of a robbery information was taken to the *Ywagaung*, by the accused's sons and the information they gave was that robbery was going on. The *Ywagaung* thereupon called out the villagers and the robbers made off. The villagers' pursuit was fruitless. The *Ywagaung* sent two men to report the case to the headman the same night. They went and reported that "a house had been entered by men" and that no property had been taken. The headman took no action "because no property had been taken." Next morning the accused reported to the *Ywagaung* that some property had been taken, but of little value. The *Ywagaung* said he would send word to the headman but the accused said "the property is of little value, let it go, do not report." The *Ywagaung* accordingly refrained from sending further report. The accused was convicted under section 202, Indian Penal Code, and fined Rs. 25 for saying to the *Ywagaung* that he need not report the loss of the property.

Held,—that, in the circumstances, the conviction was bad. There was not in what the accused said or did, or omitted to say or do, any such intentional omission to give information as is punishable under section 202, Indian Penal Code.

THE evidence shows that at the time of the robbery information was taken to the *Ywagaung* by Tha Dun's sons, and the information they gave was that robbery was going on. The *Ywagaung* thereupon called out the villagers and the robbers made off. The villagers' pursuit was fruitless. The *Ywagaung* sent two men to report the case to the headman the same night. They went and reported that "a house had been entered by men" and that no property had been taken. The headman took no action "because no property had been taken."

Next morning Tha Dun reported to the *Ywagaung* that some property had been taken, but of little value. The *Ywagaung* said he would send word to the headman, but Tha Dun said "the property is of little value, let it go, do not report." The *Ywagaung* accordingly refrained from sending further report.

Tha Dun has been convicted under section 202, Indian Penal Code and fined Rs. 25 (fine paid) for saying to the *Ywagaung* that he need not report the loss of the property.

I am of opinion that, in the circumstances, the conviction is bad.

Tha Dun is an old man of 70. I do not find in what he said or did, or omitted to say or do, any such intentional omission to give information as is punishable under section 202.

He reported the robbery or attempt at robbery at the time. He said at once that he and others had been tied up and property demanded. He says he did not know till next morning that any property had been taken. This is very probable. When he did know

Penal Code—202.

he gave the information to the *Ywagaung*. Either the *Ywagaung* or the messengers he sent were by their own accounts singularly lax in omitting (if they did omit) to state plainly to the headman that the offence was robbery or attempt at robbery. But for this Tha Dun was not in any way responsible. The headman, who lived apparently elsewhere, was perhaps lax in taking no action when he ought to have seen that the case was a serious one. But Tha Dun is not responsible for this. Finally, the *Ywagaung* ought to have sent to the headman next morning the information that some property had been taken and that the case was one of robbery. But Tha Dun cannot be held responsible for this. The duty of the *Ywagaung* as well as of every one else was to give information. That the old man Tha Dun said "let the property go, don't report" was no reason for the *Ywagaung* omitting to do his duty.

The wrong man has been punished in this case. The conviction and sentence are set aside. The fine will be refunded.

KING-EMPEROR
v.
NGA THA DUN.

 Penal Code—210.

 Penal Code—210.

Criminal Revision
No. 897 of
1899.
November
3rd.

Before H. Thirkell White, Esq., C.I.E.

MUNSHI RAM v. DERA MUL.

Mr. Moodaliar—for the applicant.

Decree fraudulently obtained for amount already paid—Decree-holder liable to prosecution.

The appellant filed a complaint against the respondent under section 406, Indian Penal Code, alleging that, having been paid certain money in execution of a decree, he, the respondent, applied for execution of the same decree.

Held,—that if a decree-holder obtains satisfaction of a decree but fails to certify it under section 258, Code of Civil Procedure, and then proceeds to take out execution of the same decree, he is clearly liable to prosecution under section 210, Indian Penal Code.

References :—

I.L.R., 9 Mad., 101.

I.L.R., 10 Bom., 288.

THE Subdivisional Magistrate has based his dismissal of the complaint on incorrect grounds. If a decree-holder obtains satisfaction of a decree but fails to certify it under section 258, Code of Civil Procedure, and then proceeds to take out execution of the same decree, he is clearly liable to prosecution under section 210, Indian Penal Code. There are rulings to this effect, namely, those in *Queen-Empress v. Pillala** and *Queen-Empress v. Bapuji Dayaram*.† Any possible doubt which may have existed when the judgment in the latter case was delivered has been set at rest by the amendment of section 258 of the Code of Civil Procedure, effected by Act VII of 1888, which makes it clear that the last sentence of that section refers only to the Court executing the decree.

But I think that the District Magistrate is right in holding that the case falls under section 210 and not under section 406, Indian Penal Code. There is a passing allusion in the judgment of the High Court of Bombay above cited, to the possibility of a prosecution under section 406, Indian Penal Code, in a case of this kind. But the point was not elucidated. And, in my opinion, the fact stated by the applicant can hardly be said to disclose the offence of criminal breach of trust. The offence, if any, consisted not in the disposal of the money originally paid, but in the subsequent application for execution.

The applicant's proper course is therefore to take such steps, if any, as he may be advised to take to procure sanction to the prosecution of the respondent under section 210, Indian Penal Code.

The present application is dismissed.

* I. L. R., 9 Mad., 101.

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† I. L. R., 10 Bom., 288.

Penal Code—211, 500.

Penal Code—211, 500.

Before H. Adamson, Esq.

QUEEN-EMPRESS v. MI GYWET.

*Penal Code, 211, 500—False charge with intent to injure—Defamation—Punishment.**Criminal Revision
No. 494 of
1899.
May
25th*

The complainant made a complaint that the accused, with the intent of causing injury, had instituted a criminal proceeding against him knowing that there was no just ground for such proceeding. The Magistrate took action against her under section 500, Indian Penal Code, convicted her of the offence, and sentenced her to pay a fine of Rs. 40 or 40 days' rigorous imprisonment.

Held,—that the Magistrate's proceedings were illegal. The offence alleged was one under section 211, Indian Penal Code, and under section 195, Code of Criminal Procedure, cognizance should not have been taken of it without sanction. A Magistrate cannot give himself jurisdiction to try an offence under section 211 by treating it as one under section 500, Indian Penal Code.

THE complainant made a complaint to the Magistrate that the accused, with the intent of causing injury to him, had instituted a criminal proceeding against him knowing that there was no just or lawful ground for such proceeding, and that she, the accused had thereby defamed him. The Magistrate took action against her under section 500, Indian Penal Code, convicted her of that offence, and sentenced her to pay a fine of Rs. 40 or, in default, to suffer rigorous imprisonment for 40 days, and awarded half of the fine to complainant as compensation.

The proceedings were wholly illegal. The offence alleged was one under section 211, Indian Penal Code, and under section 195, Criminal Procedure Code, cognizance should not have been taken of it without sanction. A Magistrate cannot give himself jurisdiction to try an offence under section 211 by treating it as one under section 500, Indian Penal Code.

The conviction and sentence are set aside and the fine, if paid, must be refunded. There is neither a jail warrant nor a chalan in the proceedings. There ought to be one or the other. I am therefore unable to say whether the fine has been paid and whether the amount awarded in compensation has been paid to the complainant. If compensation has been paid, it should now be recovered in the manner provided by section 547, Criminal Procedure Code.

The District Magistrate, in submitting this case for revision, has asked for rulings on several points that are not connected with the present record. The High Court will only deal with points that appear on the record. It is not a Delphic oracle to be approached for the purpose of obtaining answers to irrelevant conundrums.

 Penal Code—269.

 Penal Code—269.

Criminal Revision
No. 474 of
1900.
June
19th
 —.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. { (1) SAN HLA.
 { (2) NGA PAIK.
 { (3) NGA HNYA.

Mr. H. N. Hirjee—for the Crown.

Inoculation not unlawful under s. 269, Indian Penal Code.

The accused were sent up for trial for practising inoculation, which was alleged to be an offence under section 269, Indian Penal Code.

Held,—that, in order that there may be a conviction for inoculation under section 269, Indian Penal Code, it must be shown [that the act is done, if not unlawfully, at least negligently, and that the mere performance of inoculation is not punishable under the section.

THE accused were sent up for trial for practising inoculation, which was alleged to be an offence punishable under section 269, Indian Penal Code. That section renders liable to punishment any one who, unlawfully or negligently, does any act which is, and which he knows, or has reason to believe, to be likely to spread the infection of any disease dangerous to life. It has been held in a Madras case, which is cited in all the text-books on Indian Criminal Law, that inoculation is not in itself an illegal or negligent act. The case is a very old one, but it seems never to have been overruled or dissented from, and the Legislature has not amended the law in consequence. There is no legal prohibition of inoculation except in places to which the Vaccination Act applies. It cannot be said that inoculation is in itself unlawful. Again, in order that there may be a conviction under section 269, Indian Penal Code, it must be shown that the act is done, if not unlawfully, at least negligently. This is the difficult word in the section. It must have some meaning. The section cannot be read as if the words unlawfully or negligently were omitted. Yet, except by omitting these words, it is difficult to see how the deliberate practice of inoculation by a person qualified to perform it where no negligence in the performance of the operation is alleged, can be held to be punishable under the section.

There is another very strong reason for thinking that inoculation is not by itself punishable under this section. Section 6 of the Vaccination Act, 1880, explicitly prohibits inoculation in any local area to which the act applies, and thereby makes it unlawful. The penalty attached to this illegal act by section 22 of the same enactment is simple imprisonment for three months or fine not exceeding Rs. 200 or both. If inoculation were already an offence under section 269 of the Penal Code, it is difficult to see what would be the object of these later provisions attaching to it, in certain strictly limited areas, a less-severe penalty than that imposed by section 269. One of the objects.

Penal Code—269.

of the Vaccination Act, as stated in the preamble, is to give power to prohibit inoculation. If inoculation were already unlawful by reason of section 269 of the Penal Code, it would have been unnecessary to give this power, and the provisions of the Vaccination Act concerning inoculation would be superfluous.

I am therefore reluctantly compelled to dissent from the learned District Magistrate and to hold that the mere performance of inoculation is not punishable under the section cited above, and that the accused in this case have been properly discharged.

QUEEN-EMPRESS
v.
SAN HLA.

 Penal Code—299, 300.

 Penal Code—299, 300.

Criminal Appeal
No. 75 of
1901.
August
17th.

Before G. W. Shaw, Esq.

NGA YAN THEIN *v.* KING-EMPEROR.

Culpable homicide—Murder—Difference between.

Appellant was convicted under section 302, Indian Penal Code, and sentenced to transportation for life for the murder of Tha Zôn. Appellant and his wife had been divorced during the afternoon and the wife had gone to deceased's house. Appellant had been to the house twice to see her, and about 8 P.M. was spying round again. Deceased, finding that somebody was peeping into his house, sent for the headman and called out "who is that spying?" Appellant, who was sitting 13 cubits off with his loins girt up and a big stick in his hands, answered that it was he and that he was at his own house which was true enough as his own house was next door. Deceased came out and told him not to come to his house. Appellant dared him to prevent him and forced his way on to deceased's house. Deceased pushed him off and came down with him.

The house was only some two feet above the ground and they fell on their Appellant then ran to where he had been sitting, picked up the big stick and struck deceased on the head with it, using both hands. Deceased was felled by the blow. Appellant then struck him a second similar blow on the head and a third on the back. The two blows on the head both fractured the skull and wounded the brain and were mortal from the first. Deceased never regained consciousness and died of the injuries the following afternoon in the hospital.

Held,—that appellant, if he did not intend to cause death, must have intended to cause such injury as was likely in the ordinary course of nature to cause death, or must at least have known that his act was so imminently dangerous that it must in all probability cause death. The offence thus amounted to murder and the appellant was rightly convicted, but he might well have been sentenced to death.

Pointed out,—that all murder is culpable homicide, but all culpable homicide is not murder. Thus section 299 covers wider ground than section 300.

Reference:—

S. J. L. B., page 508.

APPELLANT, Yan Thein, has been convicted under section 302, Indian Penal Code, and sentenced to transportation for life for the murder of Tha Zôn, at Labo, on the 30th April last.

The facts are clearly stated in the judgment of the Sessions Court and there is no doubt about them. Appellant and his wife had been divorced during the afternoon and the wife had gone to deceased's house. Appellant had been to the house twice to see her, and about 8 P.M. was spying round again. Deceased, finding that somebody was peeping into his house, sent for the headman and called out "who is that spying?"

Appellant who was, according to the headman, sitting 13 cubits off with his loins girt up and a big stick in his hands, answered that it was he, and that he was at his own house, which was true enough as his own house was next door. Deceased came out and told him not to come to his house. Appellant dared him to prevent him and forced his way on to deceased's house. Deceased pushed him off and came down with him. The house was only some two feet above the ground

 Penal Code—299, 300.

and they fell on their feet. Appellant then ran to where he had been sitting, picked up the big stick and struck deceased on the head with it, using both hands. Deceased was felled by the blow. Appellant then struck him a second similar blow on the head and a third on the back. The two blows on the head both fractured the skull and wounded the brain and were mortal from the first. Deceased never regained consciousness and died of the injuries the following afternoon in the hospital.

The stick was a plank 3 feet 10 inches long, 2½ inches wide, and weighed nearly 95 tolas. Deceased was justified by section 104, Indian Penal Code, in pushing appellant out of the house. There was thus no such provocation as would take the case out of section 300 (*see* exception 1, proviso 3). Similarly, exception 4 would not apply as appellant took an unfair advantage in using the plank and acted in a cruel manner in using the force he did and in striking deceased after he had fallen down.

There can be no doubt that appellant, if he did not intend to cause death, must have intended to cause such injury as was likely in the ordinary course of nature to cause death, or must at least have known that his act was so imminently dangerous that it must in all probability cause death. The offence thus amounted to murder and the appellant has been rightly convicted.

I think that appellant might well have been sentenced to death. The learned Sessions Judge has taken a lenient view of the case, which it is not very easy to account for on the evidence. In his judgment the learned Sessions Judge has referred to the ruling in *Queen-Empress v. Po Thee** and has discussed the definitions of murder and culpable homicide in sections 300 and 299, Indian Penal Code. He does not seem to me to have correctly apprehended the difference between these sections. He says "Paragraph 300 amplifies 299, but includes it." This is incorrect. Section 299 defines culpable homicide and section 300 murder. All murder is culpable homicide, but all culpable homicide is not murder. Thus section 299 covers wider ground than section 300. As I understand the sections the difference may be explained thus—

Intention of causing death.

Section 299, culpable homicide.— "Causes death by doing an act with the intention of causing death."	Section 300, murder.—"Causes death by doing an act with the intention of causing death."
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Intention of causing bodily injury likely to cause death.

Section 299, culpable homicide.— "Causes death by doing an act with the intention of causing such bodily injury as is likely to cause death."	Section 300 murder.—Secondly "causes death by doing an act with the intention of causing such bodily injury as, the offender knows to be likely to cause the death of the person to whom the harm is caused."
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* S. J., L. B., page 508.

NGA YAN THEIN
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 Penal Code—299, 300.

NGA YAN THEIN
v.
KING-EMPEROR.

[N.B.—Causing death by doing an act with the intention of causing such bodily injury as is likely to cause death is only culpable homicide not amounting to murder unless the facts fall under either section 300, secondly, or section 300, thirdly.]

Thirdly.—“Causes death by doing an act with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.”

Knowledge that he is likely by such act to cause death.

Section 299, culpable homicide.—“Cause death by doing an act with the knowledge that he is likely by such act to cause death.”

[N.B.—Causing death by doing an act with the knowledge that he is likely by such act to cause death is only culpable homicide not amounting to murder, unless the facts fall under section 300, fourthly.]

Section 300, murder.—Fourthly, “causes death by doing an act which the offender knows to be so imminently dangerous that it must in all probability cause death, &c.”

In short, section 300, fourthly, to which the learned Sessions Judge has referred, does not include every case of knowledge. This is what I think the learned Judicial Commissioner, Lower Burma, meant when he distinguished between acts which are so imminently dangerous that they must in all probability cause death and acts which are only likely to cause death. The latter includes the former, but every act likely to cause death is not an act so imminently dangerous that it must in all probability cause death.

I see nothing to dissent from the judgment in question.

It is, as the learned Sessions Judge remarks, and as the learned Judicial Commissioner in the case in question remarked, not always easy to distinguish between acts which fall under one or other of the descriptions of culpable homicide which amount to murder and those which do not amount to murder. In such cases, to quote the Lower Burma judgment, it is incumbent on the Criminal Courts to give the accused the benefit of the doubt.

In *Queen-Empress v. Po Thet** there had been some provocation; only one blow was struck and that was not given with much force. The learned Judicial Commissioner, therefore, gave the accused the benefit of the doubt and classed the case as one where there was knowledge that he was likely to cause death, but where the knowledge did not fall under section 300, fourthly. The present case is different. Three blows were struck, two very heavy ones on the head, the second of which was delivered after the deceased had fallen down and there was no such provocation as brought the case under exception 1 to section 300.

The appeal is summarily dismissed.

* S. J., L. B., page 508.

Penal Code—299, 304.

Penal Code—299, 304.

Before H. Thirkell White, Esq., C.I.E.

NGA SHWE BAW *v.* QUEEN-EMPRESS.

Mr. H. M. Lütter—Government Prosecutor—for the Crown.

Death caused by ill-treatment of woman for the purpose of extorting a confession and subsequent neglect, amounts to culpable homicide.

Criminal Appeal
No. 128 of
1900.
November
27th.

The appellant was convicted of the culpable homicide of Ma Ngè, as well as of other offences. It was proved that Ma Ngè was accused of stealing some money belonging to one Maung Ba and that she was made over to the accused who was in charge of the nearest Police-station. It was proved that the appellant ill-treated the deceased, Ma Ngè, in Nga Ba's hut the next morning. The ill-treatment, which consisted of beating or pounding or pressing with an iron hammer, was for the purpose of extorting a confession and the discovery of stolen property. After this she was taken off again to the Police-station, but she was unable to walk so far; she fell down and had to be carried. She was kept in the Police-station for three days or so and received no medical attendance. She was removed again to the hut where she lived before and some five days later she died. The deceased died from the effects of the ill-treatment which made her so ill that she was unable to take nourishment and death ensued from exhaustion. If she had received proper medical treatment she would probably have recovered.

Held—that a man who treats a woman with such violence as to cause serious bruises and an open wound, and to render her incapable of walking any distance and who then leaves her while directly in his custody without any medical attendance, while she is unable to rise from her bed for at least three days, must be held to know that he is likely to cause her death.

Held also,—that the case fell clearly under the first clause of section 304, Indian Penal Code, and that the appellant must be presumed to have intended to cause by his acts and omissions such bodily injury as was likely to cause death.

THE appellant has been convicted of the culpable homicide of Ma Ngè also of voluntarily causing hurt to her for the purpose of extorting a confession, also of wrongfully confining her and one Thaik Nyun.

I consider it proved that Ma Ngè and Thaik Nyun were accused of stealing some money belonging to one Maung Ba and that they were made over to the accused who was in charge of the nearest Police-station. It is alleged that the accused tortured the woman on the night on which she was given into his custody; and there are, no doubt, statements and circumstances which indicate that this probably happened. But I think the facts are not sufficiently clearly established to justify a finding on this point. I think it is clearly proved that the appellant, Shwe Baw, and probably the witness Nga Ba, ill-treated the woman in Nga Ba's hut next morning. There is abundance of evidence on this point which can hardly I think be concocted, though no doubt Nga Ba's share in the ill-treatment has been minimized or denied. I have no doubt that the deceased was cruelly treated in the hut by or in the presence and under the authority of the appellant. I think it is also proved that she was then taken to

 Penal Code—299, 304.

NGA SEWE BAW
v.
QUEEN-EMPRESS.

some bushes at a little distance from the hut ; but it is not quite certain whether she was subjected to further ill-usage there. The ill-treatment in the hut, which consisted of beating or pounding or pressing with an iron hammer, was certainly for the purpose of extorting a confession and the discovery of stolen property. After this, the deceased was taken off again to the Police-station, but she was unable to walk so far ; she fell down and lay under a tree and had to be carried to the station. It is in evidence that before she was taken to the Police-station on the previous night she was quite well. She was kept in a hut in the enclosure of the Police-station for three days or so ; and she received no medical attendance. There is evidence that the accused was advised to send her to the hospital at Sagaing for treatment and that he refused to do so. But I am not satisfied that this is proved. After she had been detained for about three days, she was allowed to be removed to the hut where she had lived before. There is evidence which seems to be credible that she could not walk but had to be supported by two men. Some five days later she died. After her death, the District Superintendent of Police and Civil Surgeon saw severe bruises on the thighs of the deceased and the District Superintendent of Police saw a wound on one leg. I disregard the evidence as to the suggestion that the hut should be burnt down as there is nothing to show that the suggestion was made by the appellant. It is certain, however, that he held a perfunctory inquest as to the cause of death, that the two elders called as witnesses or assessors at the inquest did not even see the body, and that the witnesses examined were tutored either by Shwe Baw or Nga Ba, to say that death resulted from natural causes. The evidence as to the state of the woman's health and the evidence of the Civil Surgeon show that this was not the case.

The medical evidence is not very satisfactory. But I think there can be no doubt that the deceased died from the effects of the ill-treatment which she received at the hands of the appellant. The effect of this ill-treatment was to make the woman so ill that she was unable to take nourishment and death ensued from exhaustion. If she had received proper medical treatment, she would probably have recovered.

The action of the appellant was no doubt barbarous in the extreme. It remains to be seen whether he is guilty of the offence of culpable homicide of which he has been convicted. The mere beating to which the deceased was subjected was, apparently, not in itself enough to cause death ; and it is not suggested that there was any intention to cause the woman's death. But the beating or ill-treatment was such as to put the deceased in such pain that she was unable to walk far, and it is shown that the appellant was well aware of this. She had to be carried to the Police-station and there she was left for three days, without any special attention, in the appellant's immediate charge. It seems to me that a man who treats a woman

Penal Code—299, 304.

with such violence as to cause serious bruises and an open wound, and such as to render her incapable of walking any distance, and who then leaves her while directly in his custody without any medical attendance, while she is unable to rise from her bed, for at least three days, must be held to know that he was likely to cause her death. I think that the appellant was clearly responsible for all that occurred up to the time when the deceased was taken back to the hut by Po Shan and Po So. I find that the violence used was not in itself likely to cause death, but that the violence followed by neglect was likely to cause death and as a matter of fact did cause it. I cannot find that the appellant was responsible for the care of the deceased after she was taken away to the hut by Po Shan and Po So; but up to that point he was responsible. The fact that, even after this, proper treatment would have saved the woman's life does not affect the guilt of the appellant. That is clear from the second explanation to section 299 of the Penal Code. I am therefore of opinion that the appellant has been rightly convicted of culpable homicide. I am in doubt whether he should not also have been convicted of murder. It is difficult to see how the case can be distinguished from that described in the second clause of section 300 of the Penal Code. But as the appellant has been formally acquitted of the charge of murder, I do not propose to interfere. The conviction under section 343 in respect of Ma Ngè seems to be unsustainable. It is not shown that she was illegally detained for three clear days. The conviction should apparently be under section 342. The convictions on the other charges seem to be correct.

I have called upon the appellant to show cause why the sentence should not be enhanced. He is unable to show any sufficient cause but pleads that he did not beat or ill-treat the deceased and that he is ignorant of the law. Reference has also been made to his previous good service.

I think that the case falls clearly under the first clause of section 304, Indian Penal Code, and that the appellant must be presumed to have intended to cause by his acts and omissions such bodily injury as was likely to cause death. It is one of the worst cases that can possibly be imagined, and I see no reason why the extreme sentence allowed by the law should not be passed. I therefore enhance the sentence on Shwe Baw, under section 304, Indian Penal Code, to one of transportation for life. The direction of the Court of Session that the other sentences should run concurrently with the sentence under section 304, Indian Penal Code, will not be disturbed.

NGA SEWE BAW
QUEEN-EMPRESS.
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 Penal Code—300, 302.

 Penal Code—300, 302.

Before H. Thirkell White, Esq., C.I.E.

NGA MIN PO v. QUEEN-EMPRESS.

Criminal Appeal
No. 14 of
1900.
November
26th.

Mr. W. Calogreedy—for appellant.

Mr. H. M. Lütter—Government Prosecutor—for the Crown.

Culpable homicide amounting to murder—undue advantage taken in a sudden fight.

The appellant was convicted of the murder of one Nyi Le and sentenced to transportation for life. It was admitted that the appellant caused the death of Nyi Le, and the only point for determination was whether his act amounted to murder, culpable homicide, or voluntarily causing grievous hurt. There was a quarrel between the two men and the accused picked up a heavy spade and struck the deceased one blow with the iron-bound end, smashing in the left side of the skull. Nyi Le died from the effects of this injury.

Held—that when a man strikes another with a heavy iron-bound stick on the head, with such force as to smash in one side of his skull, he must be held to have intended to cause such bodily injury as he knows to be likely to cause death. In such circumstances the accused must be presumed to know and intend the probable natural consequences of his act.

Held also,—that if two men fight with their hands, or with weapons of a similar kind, and one of them uses also a weapon of a distinctly advantageous kind, such as a pistol, a dagger, or a heavy club, he takes an undue advantage over his opponent and is not protected by the fourth exception to section 300, Indian Penal Code.

References:—

Mr. Mayne's Criminal Law of India, page 610.
 _____, page 586.
 Selected Judgments, Lower Burma, page 271.
 _____, page 371.

THE appellant Min Po has been convicted of the murder of Nyi Le and has been sentenced to transportation for life.

It is admitted that Min Po caused the death of Nyi Le, and the only point for determination is whether his act amounted to murder, culpable homicide, or voluntarily causing grievous hurt. There was a quarrel between the two men and the accused picked up a heavy spade and struck the deceased one blow with the iron-bound end, smashing in the left side of his skull. Nyi Le died from the effects of this injury. The occurrence took place some years ago, but the appellant has only lately been brought to trial. The presence of the Civil Surgeon, who held the *post-mortem* examination of Nyi Le's body, could not be secured at the trial. The present Civil Surgeon, who gave his opinion on inspection of the instrument used by the appellant, and on perusal of the evidence of the *post-mortem* examination, was of opinion that when the blow was delivered the spade must have been held in both hands, and there is evidence that this was really the case. It is suggested that the appellant did not aim at the deceased's head, but merely struck at random, and that the

 Penal Code—300, 302.

deceased received the blow while trying to evade it. There is the evidence of one witness (Shwe Zin) that the deceased tried to dodge the blow. But as a matter of fact, the blow was delivered with both hands and with fatal force and precision. In my opinion, when a man strikes another with a heavy iron bound stick on the head, with such force as to smash in one side of his skull, he must be held to have intended to cause such bodily injury as he knows to be likely to cause death. In such circumstances the accused must be presumed to know and intend the probable natural consequence of his act. It is idle to expect direct evidence of intention and knowledge. Natural presumptions must be drawn from the facts and the ordinary course of events. Unless therefore the case falls within any of the exceptions to section 300 of the Indian Penal Code, I am of opinion that the appellant committed murder just as much as if he had stabbed the deceased with a dagger or shot him with a gun. I do not think that he actually intended to kill the deceased. But the case falls within the second clause of section 300.

NGA MIE FO
v.
QUEEN-EMPEROR.

The exception on which reliance is placed is the fourth, which reduces the offence to culpable homicide when it is committed in a sudden fight, in the heat of passion, upon a sudden quarrel and without the offender having taken undue advantage, or acted in a cruel or unusual manner. Reference has been made to Mr. Mayne's learned commentary on the Penal Code, as well as to reported cases. The remark on which most stress is laid is the following:—

"The last clause of the exception, as to taking undue advantage, and acting in a cruel and unusual manner, seems according to the English decisions, rather to apply to the beginning than to the end of the proceeding, and to be taken as furnishing evidence that the injury was inflicted deliberately and not under the influence of passion."*

The case cited immediately afterwards does not seem to furnish much light on the question. And it may be well to bear in mind Mr. Mayne's caution that—

"Culpable homicide is perhaps the one branch of Criminal Law in which an Indian student must be most careful in accepting the guidance of English authorities."†

The learned advocate for the appellant, with much fairness, has referred to the case of *Shwe Tha U*,‡ as well as to that of *Shan Gyi*,§ both decided in Lower Burma. In the former case, the accused and the deceased quarrelled, abused each other, and struggled together, and in the course of the struggle the accused drew a clasp knife and gave the deceased two stab wounds. The learned Judicial Commissioner held that, though the accused stabbed the deceased "without premeditation, in a sudden fight, in the heat of passion

* The Criminal Law of India, page 610.

† The Criminal Law of India, page 586.

‡ S. J., L. B., 271.

§ S. J., L. B., 371.

 Penal Code—300, 302.

NGA MIN PO
v.
QUEEN-EMPRESS.

and upon a sudden quarrel," he must be held to have taken undue advantage in stabbing his opponent, who was unarmed. In the latter case, the accused and deceased were struggling together and another man put a knife into the hand of the accused, with which he at once stabbed and killed the deceased. The learned judicial Commissioner held that the case was covered by the exception. With the very greatest respect, I venture to think that the cases cited in support of this ruling refer rather to the first than to the fourth exception to section 300 of the Penal Code. Looking at the words of the section which, interpreted according to recognized laws of construction, constitute the ultimate guide, I have no doubt that the ruling in the case of *Shwe Tha U** should be followed. If the ruling in *Shan Gyi's case*† conflicts therewith, I respectfully dissent from it. If two men fight with their hands, or with weapons of a similar kind, and one of them uses weapon of a distinctly advantageous kind, such as a pistol, a digger, or a heavy club, it seems to me that he takes an undue advantage and that his passion does not avail to mitigate his crime.

This, it seems to me, is what happened in this case, and I am of opinion that the learned Sessions Judge has rightly interpreted the law and that the conviction is correct. I agree that the case is not one in which it was necessary to pass a capital sentence.

The appeal of Min Po is dismissed.

* S. J., L. B., 271.

† S. J., L. B., 371.

 Penal Code—300, 304.

 Penal Code, 300—304.

Before H. Thirkell White, Esq., C.J.E.

A WE v. QUEEN-EMPRESS.

Mr. H. M. Lütter, Government Prosecutor—for the Crown.

*Criminal Appeal
No. 92
of 1900.
September 15th.*

Causing death of thief suddenly discovered and pursued, held to be culpable homicide not amounting to murder.

The appellant found three youths stealing pine-apples from his garden. He chased them and overtaking one of them cut him down with a *da*. It was night, though not late at night, and it appears to have been dark. There was nothing to show that the deceased attempted to cause hurt to the appellant. The appellant was convicted of murder and sentenced to transportation for life. The only question was whether the appellant had been rightly convicted of murder.

Held,—that the law should be construed liberally in favour of the accused in such a case if he has acted in good faith for the protection of his person and property, though he has acted in excess of his legal rights; and that the appellant was reasonably entitled to the benefit of exception 1 to section 300 of the Indian Penal Code, having acted under the excitement of grave and sudden provocation.

Reference:—5, W. R., Criminal, page 73.

THE appellant, A We, has been convicted of the murder of one Po Myo and has been sentenced to transportation for life.

The facts are quite clear. The appellant found three youths stealing pine-apples in his garden. He chased them, and overtaking one of them, cut him down with a *da* inflicting six wounds. It was night, though not late at night, and it appears to have been dark. There is nothing to show that the deceased attempted to cause hurt to the appellant.

The only question is whether the appellant has been rightly convicted of murder. The learned Sessions Judge has held that the case does not fall within exception (2) to section 300 of the Indian Penal Code because the appellant had the intention of doing more harm than was necessary for the purpose of defending his property. He also holds that the appellant cannot be considered to have been deprived of the power of self-control by grave and sudden provocation, because thefts of pine-apples had been common and the appellant must have known that they were likely to occur.

In considering this case, I have referred to the judgment of Mr. Justice (afterwards Sir George) Campbell in the case of *Durwan Gir*.* Although the learned Judge had the misfortune to be in a minority in that case his remarks seem to indicate the view which should be taken in cases of this kind. Their substance is that the law should be construed liberally in favour of the accused if he has acted in good faith for the protection of his person and property, though he has acted in excess of his legal rights.

* 5, W. R., Criminal, p. 73.

Penal Code—300, 304.

A WE
v.
QUEEN EMPRESS.

In this case, I think it is clear that in inflicting several blows on the deceased with a *da*, the appellant exceeded the right of private defence and inflicted more harm than was necessary for the purpose of defence. It must be remembered that, so long as he did not inflict more harm than was necessary for the purpose of defence, the appellant had the right of inflicting any harm short of death; and that he was in the exercise of his right as the thief had not effected his retreat. The appellant might reasonably enough have supposed that the thief was carrying off stolen property whether this was really the case or not. But no doubt it was, strictly speaking, not necessary to inflict so many blows for the purpose of securing the thief and his supposed booty.

But it is not so clear to me that the appellant may not fairly be entitled to the benefit of the first exception to section 300, Indian Penal Code. I do not think that the prevalence of garden-thefts shows that this cannot be allowed. The fact that thefts in the garden were common would rather tend to increase the anger and excitement of the garden-owner when he came upon three thieves in the act. It seems to me that, in such a case, the gardener might well be deprived of the power of self-control by the provocation which was sufficiently grave and at the moment sudden. The appellant does not seem to have acted with premeditation; there is nothing to show that he armed himself deliberately for the purpose of wounding the thieves. What I believe happened was that he came upon the thieves suddenly, gave chase, and in the excitement of the moment, slashed at one of them without due regard to the consequences of his acts. I am of opinion that he is reasonably entitled to the benefit of the exception, having acted under the excitement of grave and sudden provocation.

I therefore alter the conviction of the appellant A We to one of culpable homicide, not amounting to murder, punishable under section 304, Indian Penal Code. The punishment which I think appropriate is that suggested by Campbell, J., and in the end actually imposed in the case above cited. That was a case in which, while in some ways the circumstances were more favourable to the accused than those of the present case, the accused nevertheless acted with some deliberation, sending for the weapon with which he killed the house-breaker.

I alter the sentence on A We to a sentence of rigorous imprisonment for one year.

Penal Code—302, 325.

Penal Code—302, 325.

Before H. Thirkell White, Esq., C.J.E.

NGA PO TIN v. QUEEN-EMPRESS.

Mr. W. Calogreedy—for appellant.

| Mr. H. M. Lütter—for respondents.

Murder—culpable homicide—voluntarily causing grievous hurt.

*Criminal Appeal
No. 16 of
1900.
March.
19th.*

The deceased died from the effects of a blow on the head by a stick delivered by the appellant. There was no premeditation. The blow was delivered in the dark. The stick used was not a lethal weapon. The deceased's skull was unusually thin.

Held,—That there was no intention of causing death, and that there was also not sufficient ground for presuming that the appellant intended to cause such bodily injury as was likely to cause death or knew that his act was likely to cause death.

Held,—That the appellant should be convicted of voluntarily causing grievous hurt under section 325. Indian Penal Code.

References—

1, U. B. R. 1892-96, page 211.

1, U. B. R. 1897-1901, page 311.

THE appellant, Po Tin, has been convicted of the murder of Shwe Yo and has been sentenced to transportation for life.

It is practically admitted that Shwe Yo died from the effects of a blow on the head by a stick delivered by the appellant. There had been an exchange of abuse between the appellant and the deceased. The former went towards the latter, a sound as of a stick being broken off was heard and almost immediately afterwards the sound of a blow; Shwe Yo was then found lying with his skull fractured. He died the next day without recovering consciousness. The appellant was heard to say: "I have struck him, he is dead," or words to that effect, immediately after the blow was delivered. It was not till he came before the Court of Session that he explained that the deceased came to strike him with the stick and that he wrested it from him and struck him in self-defence. In his earlier statement before a Magistrate he denied having struck the deceased at all. I think that the Sessions Judge has correctly inferred that the defence set up at the Sessions trial is an after-thought and has rightly held that there is nothing to throw doubt on the natural conclusion from the evidence that the appellant broke off the stick and struck the deceased.

The only question in my mind is of what offence the appellant was guilty. From the words which were, no doubt, used by the appellant the Sessions Judge inferred that the blow was struck with the intention of causing death. If so, the offence was certainly murder. But I doubt whether the inference is legitimate. The expression is one

 Penal Code—302, 325.

NOA PO TIN
v.
QUEEN-EMPRESS.

which a Burman might use in a bombastic way without intending to convey any knowledge that he had caused a fatal injury, still less of indicating any wish to do so. A threat of causing death is one of the commonest forms of exaggeration among Burmans. It must not always be taken literally.

The weapon used was a stick, the first one that came to hand, broken off without deliberation from the adjacent hedge. It was not a very heavy or very formidable weapon. The appellant may not have struck with the intention of hitting the deceased on any vital part. The night was dark and the precise direction of the blow may have been uncertain. The evidence of the Civil Surgeon shows the deceased's skull was unusually thin. I understand that though the blow must have been delivered with considerable force, it would probably not have fractured a skull of normal thickness. I remember an English case some years ago in which similar medical evidence was given and the offence was held to be only manslaughter. But in that case the stick with which the blow was delivered was a light cane very much lighter than the stick used in the present instance.

In order to convict the accused of murder it must be held in the first place that the act amounted to culpable homicide. The act must be done (1) with the intention of causing death; or (2) with the intention of causing such bodily injury as is likely to cause death; or (3) with the knowledge that the person doing the act is likely thereby to cause death. In the present case, I think there was clearly no intention of causing death. There was no premeditation and the appellant delivered one blow with a stick with which he had hastily armed himself. Nor do I think there is any good reason to suppose that the appellant intended to cause such bodily injury as was likely to cause death. It must be presumed no doubt, that in delivering a somewhat severe blow with a stick, the accused intended or knew that in all probability the result would be to cause serious injury. But ordinarily, as I understand the medical evidence, the force used was not sufficient to cause a fatal injury. I do not think that the appellant can be held to have contemplated more than the ordinarily probable consequences of his act. Similarly, I think that the knowledge that he was likely to cause death cannot be inferred against the appellant. On consideration of all the circumstances of the case and of the medical evidence, it seems to me that death was not at all a likely result of the appellant's action. The natural and probable result was a serious wound but not a fatal one. The case is in some respects similar to that of *So Ya** in which it was held that the offence was culpable homicide and not murder. But the cases are not exactly parallel. This case is also clearly distinguishable from that of *Po Thit*.†

*1, U. B. R. 1892-96, page 211.

† Page 311.

Penal Code—302, 325.

I think that the appellant, in striking even a random blow at the deceased with a weapon which, though not lethal, was likely to inflict serious injury must be held to have intended to cause at least grievous hurt. The offence of voluntarily causing grievous hurt was therefore committed.

I alter the conviction to one of voluntarily causing grievous hurt, and, reversing the sentence of transportation for life, I sentence Po Tin under section 325, Indian Penal Code, to undergo transportation for seven years.

NGA PO TIN
v.
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 Penal Code—304.

 Penal Code—304.

Criminal Appeal
No. 20
of 1898.
March 1st.

Before G. D. Burgess, Esq., C.S.I.

NGA PYAUNG v. QUEEN-EMPRESS.

Penal Code 304—Culpable homicide not amounting to murder—Causing death by administration of datura poison in toddy for the purpose of detecting thieves.

The accused in this case was convicted by the Court of Session under section 304, Penal Code, and sentenced to ten years' rigorous imprisonment on the following findings of fact:—

"The charge against the accused, Nga Pyaung, is that on the 20th January 1898 at Nyaunggon he committed culpable homicide not amounting to murder by causing the death of Nga Te by putting poison (*datura*) into a toddy-pot, knowing or intending the death of some person unknown.

* * * * *

"The defendant found that thieves were taking his toddy and his tree was the only one then yielding toddy juice or sap for some little distance round. On the morning of the 20th January the deceased Nga Te left for his upland cultivation and said that he would be back for breakfast, but he never came. His tracks led past the fatal toddy tree. During the day defendant went to Maung Sin and some other witnesses and made most important statements to them. He said that thieves were taking his toddy, that he had put the juice of four *datura* fruit into a toddy-pot on his tree, that this toddy-pot was gone, and that, if one man drank all its contents, he would either die or be very ill. There is no reason to question this evidence. When afternoon came the members of the deceased's family began to look for him, and before dark some of his belongings (his *pas*, turban, wallet, &c.,) were found scattered about his *ya*, and further search after dark resulted in the discovery of his body at about 8 P.M. in his millet field."

There was no doubt on the evidence, including appellant-accused's own confessions, that the poison was administered by him in a pot of toddy, where it was placed for the purpose of detecting the persons who had been stealing toddy from the tree, and that accused was perfectly aware of the risk he ran, and knew that, if one man drank the whole contents of the pot, death would be the natural result.

As the Court of Session perceived, the accused should have been committed and tried on a charge of murder; but, having regard to the ignorance of the people and their addiction to old practices, no order was made for a re-trial, and the appeal was merely rejected.

Reference.—Taylor's Medical Jurisprudence, page 446, Volume I (Fourth Edition).

THE evidence leaves no room for doubt that deceased owed his death to the administration of *datura* poison.

The symptoms attending death and the *post-mortem* appearances were consistent with such poisoning as described in Taylor's Medical Jurisprudence, page 446, Volume I (Fourth Edition).

There is reason to believe that, if the things found had been transmitted to the Chemical Examiner with more care, and if the vessels containing them had not been broken, the evidence of *stramonium* poisoning would have been still more distinct.

There can also be no doubt on the evidence, including appellant-accused's own confessions, that the poison was administered by him by being placed in a pot receiving toddy from the tree for the purpose

Penal Code—304.

of detecting the thief or thieves who had been stealing toddy from that tree.

This is a very common plan of detection in Burma, and it has been repeatedly followed by fatal results as in the present instance.

The effect of datura or *padaing* in moderate quantity is to produce delirium for some time, and, if the quantity of the drugs be properly regulated, no permanent harm seems to be done. But, of course, in dealing with poisons, the regulation of the dose is a matter of great nicety and a small excess is a source of great danger.

A rough and ready calculation by the number of seed chambers is apt to lead to bad consequences, as they naturally vary in size and probably in strength also according to the stage of their growth.

In putting the poison in a *tari* pot, the thief-faker runs a particular risk, unless he adjusts the quantity so as to be safe for a single drinker. Here the evidence shows that accused was perfectly well aware of this risk, and knew that, if one man drank the whole contents of the pot, he was liable to die, though it is likely he spoke with the exaggeration of a threat and believed that he had in reality kept the amount of poison within safe limits.

As the Court of Session perceived, the accused should have been committed and tried on a charge of murder, but the circumstances do not seem to render it necessary that rectification of the matter should be made now.

Having regard to the ignorance of the people and their addiction to old practices, the logical strictness of the law need not always be applied by a superior Court in appeal or revision, though there is no excuse for a Magistrate neglecting to follow the law exactly as he finds it laid down.

It is sufficient therefore to reject this appeal.

NGA PYAUNG
v.
QUEEN-EMPRESS.

Penal Code—304—304A, 336.

Penal Code—304—304A, 336.

Criminal Revision
No. 427 of
1897.
May
13th.

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS v. NGA PO KYIN.

Penal Code, s. 304, Culpable homicide not amounting to murder—S. 304A, Causing death by rash or negligent act not amounting to culpable homicide. —S. 336, Doing an act so rashly or negligently as to endanger human life —Ss. 87—90, Consent to suffer harm—Consent given under a misconception of fact—Death caused by the bite of a venomous snake received by deceased's own act through the alleged instigation of a snake-charmer.

Quære—what offence, if any, committed?

References—

12, W.R. Cr. R., 7.

I.L.R., 5, Cal., 351.

Sir J. F. Stephen's Digest of the Criminal Law of England, Article 230.

Mayne's Criminal Law of India, section 193.

THE accused in this case was convicted by the Magistrate under sections 336 and 109, Penal Code, and sentenced to a fine of Rs. 50 or 22 days' rigorous imprisonment in default, on the following finding of fact:—

"On the 11th January 1897, at the village of Thihlagôn, one Maung Po Chit was playing with a viper under a tamarind tree opposite the house of one Maung San, where he, Maung Po Chit, was watched doing so by some 10 or 12 other villagers. Maung Po Chit played with the snake by teasing it in pulling its tail and placing his hand at some little distance before the snake's head. After a little while the accused Nga Po Kyin, who is known as a snake-charmer, arrived on the scene accompanied by two followers, and, on noticing that Maung Po Chit was timid to approach the viper too closely, accused offered him some charm or medicine, instructing Po Chit to hold the charm and then press the viper's head, but as Po Chit was about to carry out these instructions of accused, the sting of the serpent found its way into Maung Po Chit's right hand between the thumb and forefinger, causing a wound which bled. The snake was thereafter seized by one of accused's followers and placed in an earthen vessel and taken away, whilst accused removed Maung Po Chit to the latter's house, where accused injected some other medicine into Po Chit, who, after some time, became unconscious and eventually expired.

"It may be noted that some ten days previously accused injected some charm against snake-bite into the hands and feet of Maung Po Chit, for which the latter paid accused Rs. 5."

The District Magistrate referred the case under section 438, Code of Criminal Procedure. The accused was called upon to show cause why a re-trial or an enhancement of sentence should not be ordered, and the conviction and sentence were quashed, and order was made for the committal of accused for trial on a charge under section 304, Penal Code, with the addition of an alternative charge under section 304A, the questions below being pointed out as those principally arising in the case:—

(1) It did not seem to be suggested that the accused had the intention of causing death or grievous hurt. Was, then, the thing done by him known by him to be likely to cause death or grievous hurt?

(2) Was the deceased's mind in a state of misconception, and, if it was, was the misconception one of fact or of something else?

(3) Was the consent of the deceased given under a misconception of fact, and did the accused know or have reason to believe that that was so?

Suppose, for example, that an ignorant spectator at a wild beast show or menagerie were to enter the lion-cage and to be killed by a lion under one of the following inducements:

(1) the encouragement of a friend challenging him to prove his fearlessness and display his daring;

(2) the encouragement of a professional lion-tamer assuring him of the absence of danger;

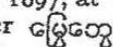
Penal Code—304—304A, 336.

(3) the encouragement of a sorcerer selling him an amulet guaranteed to be a sure protective against savage animals; would the instigator in any of these cases be criminally responsible for the fatal result? QUEEN-EMPRESS
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THE accused, who is said to be a snake-charmer, has been tried by a Subdivisional Magistrate in a summons case, has been convicted of an offence under sections 336 and 109 of the Penal Code, and has been sentenced to pay a fine of Rs. 50 or to undergo 22 days' rigorous imprisonment in default.

The judgment of the convicting Magistrate may be given *in extenso* :—

"The accused Nga Po Kyin is brought up under sections 336 and 109, Indian Penal Code, and he pleads not guilty. The facts of the case for the prosecution are briefly as follows :—

"On the 11th January 1897, at the village of Thihlagôn, one Maung Po Chit was playing with a viper  under a tamarind tree opposite the house of one Maung San, where he, Maung Po Chit, was watched doing so by some 10 or 12 other villagers. Maung Po Chit played with the snake by teasing it in pulling its tail and placing his hand at some little distance before the snake's head. After a little while the accused Nga Po Kyin, who is known as a snake-charmer, arrived on the scene accompanied by two followers, and on noticing that Maung Po Chit was timid to approach the viper too closely, accused offered him some charm or medicine, instructing Po Chit to hold the charm and then press the viper's head, but as Po Chit was about to carry out these instructions of accused, the sting of the serpent found its way into Maung Po Chit's right hand between the thumb and forefinger, causing a wound which bled. The snake was thereafter seized by one of accused's followers and placed in an earthen vessel and taken away, whilst accused removed Maung Po Chit to the latter's house, where accused injected some other medicine into Po Chit, who after some time became unconscious and eventually expired.

"It may be noted that some 10 days previously accused injected some charm against snake-bite into the hands and feet of Maung Po Chit, for which the latter paid accused Rs. 5.

"The accused denies having supplied Maung Po Chit with charms and instructing the latter to press the head of the snake. He admits being present when Maung Po Chit was bitten by the snake and also administering some medicine to Maung Po Chit who died thereafter. Accused further admits that there were some 10 other persons present when Maung Po Chit was bitten by the snake. Accused produces two witnesses for his defence, who are both his followers, and they corroborate accused that the latter did not abet Maung Po Chit to touch the snake, and that accused did not give Maung Po Chit any charm to hold and then touch the snake.

"I am not inclined to believe the statement of the accused and the evidence of his two witnesses, Maung Sa and Maung Po Swe, that accused did not abet Maung Po Chit to catch the snake. Had this been really so, accused would have found no difficulty whatever in producing independent testimony to prove this fact, instead of bringing forward his two followers, as accused himself admits that there were some 10 persons present.

"I see no reason whatever to doubt the statement of the witnesses for the prosecution that Maung Po Chit was given some supposed charm by accused and then instigated to press the snake's head.

"It is now left for me to determine as to whether such instigation would bring the accused under sections 336—109, Indian Penal Code.

 Penal Code—304—304A, 336.

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"There can be no possible doubt that a bite from a viper (မြေငှက်) is immminently dangerous to human life, and there is but little hope of one surviving unless prompt action is taken to eradicate the poison from the part affected by either cutting out a portion of the flesh or burning it. Burmans, to my personal knowledge, who are so casual with snakes display a dread for this particular species of that reptile."

"On the other hand the deceased Maung Po Chit was a man of mature age and understanding. He undoubtedly consented freely to catch the snake after being armed with accused's charm and instructed by the latter to do so. It is clear that he, Maung Po Chit, was led away to do so by the great amount of confidence he placed in the abilities of accused as a snake-charmer, a not very uncommon thing among Burmans who readily believe in any kind of superstition. From the evidence recorded in this case it would appear that accused was never given to holding or seizing snakes with his own hands. I am therefore inclined to believe that he has played the part of an impostor like most men of his calling, and that he had reason to believe at the time when he gave Maung Po Chit the charm and instructed the latter to seize the snake by the head, that it was a rash act and endangered the life of Maung Po Chit.

"I do not consider the general exceptions in Chapter IV of the Indian Penal Code would excuse the accused in this case.

"I do not say that he had criminal knowledge that his advice or instructions to Maung Po Chit was *bound* to cause the latter harm, but I certainly consider accused had the knowledge at the time that it was *likely* to do so. The fact of accused denying the whole thing shows that he had this knowledge, and did not possess as much confidence in himself as a snake-charmer as he led others to believe in him.

"I am also of opinion that in a case of this kind it is expedient to convict so as to remove the superstition the people appear to have and check imposition of others who are prone to deceive the people like the accused has done in this case.

"I find accused Nga Po Kyin guilty under sections 336—109, Indian Penal Code, and I direct that he pay a fine of Rs. 50, or in default suffer 22 days' rigorous imprisonment."

The following evidence was given by the first witness for the prosecution in his examination-in-chief :—

"On the 9th *lasan* of *Pyatho* 1258 B.E. (11th January 1897) in the early morning Maung Po Chit came and asked me if I would like to play with a viper မြေငှက်. I told him "no." He then asked me to accompany him and watch him play with the snake. I accompanied him and getting down from my house I saw the snake which Maung Po Chit had in an earthen pot, which he took under a tamarind tree about 24 cubits to the north-east of my house. Maung Po Chit then commenced playing with the snake by pulling its tail. At the time Maung Paw, Maung Nyein, and some other 10 persons were present. After a little while accused, who is called မြေငှက် Saya Kyin with two others (I do not remember) arrived. Accused told Maung Po Chit not to be afraid but to catch the snake firmly, and Po Chit was afraid to do so. Accused gave Po Chit some medicine (charm to prevent snake-bites proving fatal or injurious) telling Maung Po Chit at the same time to press the snake's head. Maung Po Chit held the medicine in his hand, which he thereafter advanced to hold the snake's head, and before he touched the snake's head that reptile bit his hand (right hand) between the thumb and forefinger. Maung Po Chit remarked 'the snake has bitten me, Saya' and showed the wound, which was bleeding. Accused remarked 'no harm, you will get brave.' Accused thereafter took the medicine (charm) from Maung Po Chit and give it

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to one of his (accused's) followers, Maung Po Sa, and told him to press the snake's head, which Maung Po Sa did, and held the snake by the head and placed it in the earthen pot. Accused then remarked that he would charm Maung Po Chit, and the latter and accused went away. I then had breakfast and went to Maung Po Chit's house. I saw accused inject some medicine in Maung Po Chit's joints of the body, like tattooing a man. After a little while Maung Po Chit became unconscious and eventually died.

"About 10 days previous to Maung Po Chit's death, I saw Maung Po Chit pay accused Rs. 5 to charm him against snake-bites. This transaction took place in my house. Accused told Maung Po Chit to procure a viper ခုခွေး. I saw some medicine in the hand of Maung Po Chit while he was pulling the snake's tail before the arrival of accused. Maung Po Chit was 25 years of age."

* * * * *

The District Magistrate has sent up the case for revision with the order of reference below.

"This is a peculiar case and one which calls for remark.

"The facts which may be admitted to be proved are that the accused, who is a snake-charmer, induced the deceased Po Chit to lay hold of a Russell's viper, a venomous snake, by the head; accused did so, was bitten, and shortly after died from the effects of the bite. In spite of the evidence brought by the accused, both his witnesses being practically his followers, the witnesses for the prosecution are, in my opinion, to be credited, and by their evidence it is shown that the deceased was told by the accused to catch the reptile by the head, and when the deceased was afraid to do so that the accused gave him some medicine, which the deceased took, and on this took hold of the snake as directed by the accused and was bitten. There can be no doubt, therefore, that the accused is responsible for the death of the deceased. It is clear that section 336 of the Indian Penal Code applies to persons who cause danger to others by doing rash or negligent acts, whereas the Magistrate has interpreted that that section would apply to the deceased (had he survived) for risking his *own* life while the accused's act he has held to be abetment only. That section 336 of the Indian Penal Code does not apply to persons who by rash or negligent acts endanger their *own* lives is manifest, as, where that the case, the hundreds of gymnasts, tight-rope walkers, circus riders, and others of that class, who daily do acts which from an outside point of view would appear imminently rash, would be liable to punishment under that section. The instigation of the accused to deceased to lay hold of the snake by the head would apparently be an 'act' (which includes an illegal omission). And consequently section 336 of the Indian Penal Code would apply to the conduct of the accused.

"It seems to me, however, that the action of the accused will fall under section 304A, Indian Penal Code. That section merely applies to the doing of a rash act. It is not necessary to prove under that section any intention or knowledge of likelihood as required by the other sections of the Code relating to offences affecting life.

"That the taking hold of a deadly snake is an imminently rash act is incapable of dispute. And the accused by persuading the deceased to handle the snake which bit him did a rash act which caused deceased's death. Accused will accordingly be guilty under section 304A of the Indian Penal Code. As I consider the conviction was had under the wrong section of the Code and as the case is an important one and of an unusual character, I forwarded the papers to the High Court under the provisions of section 438 of the Criminal Procedure Code for such orders as it may think fit to pass.

"This particular snake when held in captivity bit two persons on different occasions who incautiously handled it, and there is no doubt that actions of the kind

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disclosed in these proceedings by would-be snake charmers induce such handling and should be put a stop to by exemplary punishment."

"It was on the occurrence of the second death from handling this snake that the advisability of prosecuting the accused was suggested to the police. Under all the circumstances, the punishment inflicted in this case is, in my opinion, insufficient and I think the accused might with propriety be called upon to show cause against enhancement."

The accused has been called upon to show cause why a re-trial or an enhancement of sentence should not be ordered. In answer the accused respondent has put in a petition protesting against the proposal to make any such order, representing that the term of imprisonment which he has suffered was more than sufficient punishment, and denying that he had any intention of causing the death of deceased or that he instigated him to lay hold of the snake.

Before dealing with this matter I thought it would be useful to refer to a case which I remembered as having occurred in Lower Burma concerning the death of a man who lost his life through putting faith in a charm against drowning, and after enquiry I have now been favoured with the record of this case from the Court of the Judicial Commissioner, Rangoon. The case is No. 1 of 1881, *Queen-Empress v. Nga Aung Ban*, under sections 302 and 304, Indian Penal Code, tried by the Judicial Commissioner sitting as a Court of Session.

The Judge was Mr. Justice Jardine, whose recent retirement from the Indian Bench has caused a loss of powerful judicial capacity and of profound and extensive erudition, which must be deeply deplored by all acquainted with his great gifts. The judgment does not appear to have been ever published. I do not know why, unless it was because the circumstances were so exceptional as to be considered unlikely to occur again. If this were the reason, the present case is an illustration of the want of sound foundation for such confidence; and not only is there this example, but there is another case of almost the same kind now pending * before me, in which the principal accused is being sought for in Lower Burma.

It happens too that quite recently I was personally witness to a scene the exact counterpart of that in which deceased lost his life in all but the fatal consequence. The young lads employed about the Palace gardens had caught a cobra, which they were teasing and playing with, waving their hands over it, touching it from behind, and pulling its tail. At length a man joined the group, who had particular command over snakes, and he exerted wonderful control over it with his hand, which he put so close to the creature's head as almost to touch it with his finger. Finally the reptile was put into a flower-pot to be conveyed to a remote spot where it could be let loose with safety to itself. The gardeners would by no means have it injured, for if it were killed other cobras would revenge its death by biting them, so they believed.

* Copy of order of reference annexed.

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A copy of the judgment in the Lower Burma case will be appended. The facts of that case were, briefly, that the accused tattooed the deceased with a charm, in order to test the efficacy whereof the latter allowed himself to be bound hand and foot and flung into a creek in the waters of which he perished. It was found as a fact that the accused pushed the deceased into the water.

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The accused was found guilty under section 304 of the Penal Code and sentenced to three years' rigorous imprisonment. The learned Judge found that the deceased had given his consent, but that he "acted under a misconception of fact; he believed in the supernatural; he was not certain about it, but he hoped and expected a miracle to occur and that the bonds would become loose and he would become free and swim about as usual;" and he thought "the prisoner had a similar sort of belief and was under the same misconception." At the same time he held that "the believer in miracles must, before he proceeds to imminently dangerous actions, be as diligent, as careful, and as full of good faith as anybody else. Before putting his belief to any irrevocable test, he ought to verify: the Penal Code describes 'reason to believe a thing' as having sufficient cause to believe it." And again, "men must act with ordinary circumspection and on reasonable beliefs, although, so long as they confine themselves to mere belief and do not proceed to action or omission, they may hold what beliefs they please."

The Judge considered that the offence would under clause 4 of section 300, "have amounted to murder, except for the consent given by deceased. I do not suppose that prisoner had altogether given up his belief in a natural order. I think he must have known that 'the act was so imminently dangerous that it must in all probability cause death' and that the words 'in all probability' must be taken objectively, *i.e.*, with reference to the facts of the world in which we live, not with reference to prisoner's mere opinion or belief about them."

Here are two Indian cases in which the circumstances had some resemblance to those of the present case. They are the *Queen v. Poonai Fattamah* and another* and the *Empress v. Gonesh Dooby* and *Gopi Dooby*.†

In the former of these, two snake-charmers were convicted under section 304 of the Penal Code for having caused the death of three men by making a poisonous snake bite them. It was held that the conviction was right because the case came within exception (5) to section 300, since the accused must "have acted in the belief that the deceased gave their consent with a full knowledge of the fact in the belief of the existence of powers which the prisoners asserted and believed themselves to possess," but "no doubt the deceased gave their consent under a misconception of fact, namely, a belief that the prisoners by incantations could heal or protect them from the effects of the bites of venomous snakes."

* 12 W. R. Cr. R., 7.

† I. L. R., 5, Cal., 351.

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The evidence was that the accused not only gave the deceased repeated assurances of their powers in order to persuade them to let themselves be bitten, but that the accused used force by beating the deceased, and that they caused the snake to bite by striking it with a rattan.

In the second case, the snake was put on the head of a boy who took fright and was bitten and died.

The conviction was under section 304, the learned Judges observing that section 304A did not apply, for "we consider that the 'rash act' did amount to culpable homicide. We think it may be said in this case that Gonesh did not think that the snake would bite the boy. But we think that the act was done with the knowledge that it was likely to cause death, but without the intention of causing death."

It is to be noticed that in all the cases quoted above something direct was done by the accused which had the effect of bringing about the catastrophe, whereas in the present instance this was not so. What the proceedings go to show here is that the deceased

They shall take up serpents; and if they drink any deadly thing it shall not hurt them.—ST. MARK, XVI, 18.

himself did everything that brought death upon him, but they suggest that it was the incitement given by the accused, first by using spells, as is said, to render him invulnerable to snake-bite, and secondly by putting a talisman in his hand and impelling him boldly to lay hold of the snake's head, that was the proximate cause of the death.

The question is whether this was so or not and whether the accused by so stimulating the deceased to run the risk did an act which caused death, and did an act causing death which renders him liable to punishment under the criminal law, and in that event, what is the offence which he has committed?

The question in its latter branches involves the question whether the circumstances come within any of the general exceptions in Chapter IV of the Penal Code relating to consent.

Section 87 provides that—

"Nothing which is not intended to cause death or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause to any person above eighteen years of age who has given consent, whether express or implied, to suffer that harm, or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm."

It does not seem to be suggested that the accused had the intention of causing death or grievous hurt.

Was then the thing done by him known by him to be likely to cause death or grievous hurt?

In section 90 against it is laid down that—

"A consent is not such a consent as is intended by any section of this Code if the consent is given by a person.....under a misconception of fact and

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if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such.....misconception.”

Was the consent of the deceased given under a misconception of fact, and did the accused know or have reason to believe that that was so?

As Lord Justice Bowen on one side, the state of a man's mind may be as much a fact as the state of his digestion.

Was the deceased's mind in a state of misconception and, if it was, was the misconception one of fact or of something else.

Suppose, for example, that an ignorant spectator at a wild-beast show or menagerie were to enter the lion cage and to be killed by a lion under one of the following inducements:—

- (1) The encouragement of a friend challenging him to prove his fearlessness and display his daring.
- (2) The encouragement of a professional lion-tamer assuring him of the absence of danger.
- (3) The encouragement of a sorcerer selling him an amulet guaranteed to be a sure protective against savage animals.

Would the instigator in any of these cases be criminally responsible for the fatal result?

In the digest of the Criminal Law of England written by the late Sir J. Fitzjames Stephen, Article 230, is as follows:—

“Consent to be put in danger.”

“It is uncertain to what extent any person has a right to consent to his being put in danger of death or bodily harm by the act of another.

Illustration.

“(1) A with B's consent wheels B in a barrow along a tight rope at a great height from the ground.

“C hires A and B to do so. D, E, and F pay money to C to see the performance. B is killed.

“*Quære.*—Are A, C, D, E and F, or any and which of them, guilty of manslaughter?”

And a note says that, so far as the author knows, there is no authority on the point.

In his recent work on the Criminal Law of India Mr. Mayne says, section 103, concerning the sections of the Penal Code as to consent:—

“The benefit to be procured must be one accruing to the person endangered.....Nor does it include cases of mere pecuniary benefit (explanation, section 92). Hence dangerous exhibitions are not protected by it. A person who wheels another over a height on a tight rope, or who shoots at an apple on his head, however well paid that other may be, is not being an act for his benefit within section 88. If an accident happened, the guilt of the doer would depend upon the question of fact whether the fatality was one which in the probable course of events would be likely sooner or later to arrive. If so, it would be an event which was absolutely probable, though in each particular instance the chances were against it.”

It is my province just now to indicate such questions and suggestions as the foregoing, but it is not my province at present to answer

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them. The Magistrate has most injudiciously taken upon himself to dispose of as a summons case under section 336 of the Penal Code a case of exceptional difficulty in which there were clearly *prima facie* grounds for a trial, or at the very least for an enquiry, under section 304. There has been no proper trial.

The conviction and sentence are accordingly quashed, and the committal of the accused for trial under section 304, Indian Penal Code, is ordered.

A second charge under section 304A may be framed so that nothing may be left out.

Order of reference in Criminal Revision No. 1422, by Sessions Judge, Sagaing Division.

To understand fully the facts of this case it is necessary to read proceedings of Criminal Miscellaneous Case No. 72 of 1896 of the Court of the Township Magistrate, Ava, as well as those of Criminal Regular Case No. 60 of 1896 of the same Court.

A snake-charmer named Nga Pyan tattooed a boy of 16 named Nga Shwe On on both hands to render him impervious to snake-bite. On 27th August 1896 Nga Pyan had a basket containing two 'mywe bwe' or Russell's vipers with him in Nga Ket's house in Pinya village. He told a pupil of his named Nga Balu to hand one of the vipers to Shwe On, presumably on the ground that as Shwe On had been tattooed he could no longer be injured by the bite of a deadly snake. Shwe On took the viper from Nga Balu's hand and after holding it for some little time in his own hand returned it to the basket. After this, whilst Nga Pyan and Nga Balu were talking with different people Shwe On again inserted his hand into the snake basket and took out either the same snake or the other snake which was in the basket. In this instance the viper bit Shwe On between the second and third fingers of the right hand, and from the effects of this bite Shwe On died, after being fruitlessly treated by the snake-charmer and the village elders, on the night of 28th August 1896.

Apparently no medical examination of Shwe On's body was held. It is admitted, however, that his death was undoubtedly due to snake-bite, and Nga Pyan (the snake-charmer) also admits that the vipers in his basket had not had their fangs extracted, and that he knew that they were deadly in the event of their biting a human being.

The Township Magistrate of Ava and the Subdivisional Magistrate of Ava were both of opinion that the accused Nga Pyan and his pupil Nga Balu should be prosecuted under section 304, Indian Penal Code, but the District Magistrate held that section 289, Indian Penal Code applied to the case, and the accused were consequently prosecuted before the Township Magistrate, Ava, with the result that each of the accused was convicted and sentenced under section 289, Indian Penal Code, to pay a fine of Rs. 10 or in default to undergo seven days, rigorous imprisonment. The basket and the two deadly snakes were returned to the accused Nga Pyan, who has thus paid a penalty of 10 rupees for practically taking the life of a fellow creature.

I am of opinion that section 289, Indian Penal Code, in no way applies to the present case. That section distinctly applies to cases in which an accident happens on account of negligence on the part of an owner or possessor of an animal who knowingly or negligently omits to take sufficient precautions to guard against any probable danger to human life or any probable danger of grievous hurt from such animal.

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In the present case the deceased Nga Shwe Õn was induced to play with a deadly snake because he believed that no snake could harm him on account of the medicine or charms administered by the sanke-charmer Nga Pyan. There is evidence to prove that Nga Pyan encouraged Nga Shwe Õn to handle the vipers, notwithstanding that he was fully aware that their fangs had not been extracted, and that a bite from either of them must, in the ordinary course of nature, cause the death of a human being.

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There is no evidence to show that Nga Pyan intended to cause Shwe Õn's death; it is quite possible that as a professed snake-charmer he may have believed that he had the power to prevent any evil effects after Shwe Õn had been bitten by one of his snakes. It is none the less certain that Nga Pyan is entirely responsible for Shwe Õn's death. Had Nga Pyan not tattooed Shwe Õn in the first instance and led him to believe that no snake could harm him owing to his tattooing, Shwe Õn would not have touched the snakes and would have been alive and well at the present moment. I think that Nga Pyan's conduct is much the same as that of the accused in the case of *Queen-Empress v. Gonesh Dooby and Gopi Dooby*, page 351, Indian Law Reports, Calcutta Series :—

“A snake-charmer exhibited in public a venomous snake, whose fangs he knew had not been extracted; and to show his own skill and dexterity, but without intention to cause harm to any one, placed the snake on the head of one of the spectators; the spectator tried to push off the snake, was bitten, and died in consequence.”

The only difference in the present case is that the deceased, presumably being misled by misrepresentation on the part of the accused, believed that he was proof against the poison of snakes, and voluntarily handled a deadly snake, which bit him and thereby caused his death.

Perhaps the accused's conduct falls more under the case reported in Volume 12, W. R. Cr. Cal. 7, where “the accused, professed snake-charmers, believing, though erroneously, that they had the power of restoring to health persons bitten by a snake, persuaded some persons to allow themselves to be bitten by a poisonous snake from the effects of which death ensued.”

In each of the above-quoted cases the accused were found guilty under section 304, Indian Penal Code, and it seems to me that the accused Nga Pyan in this case should have been committed to the Court of Session on a charge punishable under section 304, Indian Penal Code, and that he was wrongly convicted under section 289, Indian Penal Code. The evidence has been so briefly recorded by the Magistrate that I am not at present certain whether the accused Nga Balu should have been committed with Nga Pyan; possibly Nga Balu may be as ignorant as Nga Shwe Õn, and possibly he may have undergone deadly peril when he handled the viper and made it over to Shwe Õn.

The proceedings of the Township Magistrate, Ava, will be submitted for orders of the High Court under section 438, Code of Criminal Procedure, with a recommendation that the finding and sentence passed on Nga Pyan and Nga Balu be set aside, and that the accused be committed to the Court of Session on a charge punishable under section 304, Indian Penal Code.

Copy of Judgment in the Lower Burma case, Sessions No. 1 of 1881 of the Court of the Judicial Commissioner, Queen-Empress v. Nga Aung Ban, under sections 302—304, Indian Penal Code.

“The undisputed facts are that on the 8th February last the prisoner Nga Ban, one San Win who has since disappeared, the deceased Maung Lu, and the two witnesses, Maung Lu Ngay and Maung Po Tin, went together in a small boat on a creek at Nyaungwaing. They took with them some fruits as offerings to the

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nats or spirits. Then the prisoner tattooed on the leg of the deceased a picture of the Tharrawaddy paddy-bird and did the same for the two witnesses. They submitted to having this done because they were told that the tattooing of the paddy-bird on their bodies would render them secure against blows and enable them to escape from bonds tied round them. After the tattooing process was over a trial of the virtues of the charm was suggested; the two witnesses dreaded being made the subjects of the experiment; then Maung Lu offered himself and consented to be bound. He went to the prow of the boat and there prisoner bound him like a pig, as the witnesses relate, his hands being tied together, and his feet tied together and hands and feet being tied together, so as to prevent him from moving. It is perfectly clear that the experiment to be performed was the trial of the efficacy of the charm, the men wishing to see whether the cord would slip off and Maung Lu emerge safely from the water when he went overboard. Maung Lu fell in and went down. As he did not rise to the surface the prisoner and Lu Ngay and San Win jumped in and dived and searched for him, but without success. It was ebb tide. In the course of the afternoon the body of Maung Lu was found by the witness Maung Sa, who with a party of villagers went to search. The rope was on the corpse, the hands and feet being tied as already described, and some injury appears to have happened to the flesh as marks of blows were found by the Civil Surgeon, possibly caused by contact with some hard substance in the water. I find as facts that prisoner had no enmity nor malice against Maung Lu and the others and that he derived no personal gain from his proceedings and was to derive no such gains.

The prisoner said before the Magistrate and also in this Court that, although he bound Maung Lu, he did not push him into the water, but that the boat gave a roll and this movement caused Maung Lu to go overboard. The assessors take this view of the facts. But it is contrary to the positive testimony. The two witnesses say that prisoner pushed Maung Lu over with his foot. The assessors could not show me any reason why the witnesses should tell a lie about this matter. I think their statement is in harmony with the other circumstances, and I find on the facts that prisoner pushed Maung Lu overboard and that this was the act which caused the death of Maung Lu.

I find also Maung Lu consented to be bound hand and foot and dropped into the water in order to test the efficacy of the enchantment. I find it proved that prisoner informed them of the wonderful effects in his opinion likely to result from the tattooing of the Tharrawaddy paddy-bird on their legs after offerings made to the spirits, and that when in the boat prisoner spoke some mystic words, and evidently the three men who had the picture tattooed on their thighs thought from what prisoner had told them that some miracle might be expected when the test was applied. But as often happens among the believers in miraculous and supernatural results, two of them were men of little faith, and they declined to be pitched bound hand and foot into the creek in order to see whether the bonds would be unloosed by miraculous means. The prisoner does not appear to have offered himself to be tattooed and cast overboard; had he been a perfectly sincere believer, perhaps he would have done so in order to gain an invulnerability against blows, wounds, and bonds. At any rate he induced Maung Lu to test the charm, he tied Maung Lu up like a pig, and he pushed Maung Lu over. The Government Advocate argues that Maung Lu's consent was got by a misconception of fact and that therefore the offence is still murder and does not come within the exception. His argument is virtually that prisoner did not believe in the magic of the paddy-bird, such a belief not being a reasonable belief, and that the consent was not such as is meant in sections 99 and 300 of the Penal Code, and that he deluded Maung Lu. I find that Maung Lu acted under a misconception of fact; he believed in the supernatural. He was not certain about it, but he hoped and expected a miracle to occur and that the bonds would become loose and he would become free and swim about as usual. I think the prisoner had a similar sort of belief and was under the same misconception. The Government Advocate has

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described the prisoner's belief in the supernatural agency of spirits as a gross superstition. But as Mr. Benemy argues the prisoner has not been brought up in a country like England, where for at least two centuries science has been withdrawing the veil of enchantment from the face of nature. It is plain from the evidence that even in British Burma there is a general belief in the efficacy of tattooing as a charm and this extends even among educated men. One respectable witness has described the experiment performed on his son, it being similar to that which caused Maung Lu's death; another has in apparent good faith told us of the miracle wrought on himself and another, whose bonds became loose when they were cast bound hands and feet into the river. I find from Bishop Bigandet's learned Notes on the Legend of Buddha that the earlier belief in nats, who seem to be angels and demons, has survived everywhere from ages anterior to Buddhism and in spite of the Buddhist doctrines. In such a state of opinion, I think it very likely that the prisoner expected that Maung Lu would arise uninjured from the water. The learned Recorder of Rangoon informs me that in the case of conspiracy against the Government, which he tried some years ago, it was proved that the conspirators imagined that the process of tattooing certain figures on their skins would render them invulnerable and that one man tested the charm by cutting his own arm with a knife. We, especially in Courts of Justice, follow the rule laid down by the Judicial Committee of the Privy Council and compare any story put in evidence with the *ordinary* facts of human life or, as the Indian Evidence Act, section 114, expresses it, "with the *common* course of *natural* events, human conduct and public and private business, in their relation to the facts of the particular case." As it is the *common* course of natural events which a Judge has to treat as true or probable, I am absolved altogether from any inquiry as to whether the alleged miracles really happened. I cannot forget, however, that there was a time when learned judges acted on different principles, when such a judge as Sir Matthew Hale sentenced women to death because they had intercourse with the devil, and such a jurist as Blackstone defended these beliefs out of the Scriptures. I see nothing unreasonable therefore in supposing that prisoner may have thought that the propitiated nats or good angels would confer such efficacy on the picture of the paddy-bird as to deliver Maung Lu from death. The paddy-bird of Tharrawaddy is called the king of birds; he has three crests on his head and other distinctions, and a belief is deposed to about Shin Gaudama, the last Buddha, having in one of his existences been a paddy-bird. Under this finding I give the prisoner the benefit of the exemption as regards consent and I acquit him of the charge of murder. I follow Mr. Justice Norman in the snake-charming case at page 253, B. L. R. App. Jur. Criminal, and the cases mentioned under section 300 of Mr. O'Kinealey's edition of the Penal Code, some of which are very strong.

Mr. Benemy has argued that the prisoner is not punishable at all as he really believed that Maung Lu would be saved by miracle. My difficulty at the argument was as to why a believer in miracles should be allowed to act with less care than a believer in science. If a scientific man having a theory, only partially verified, about the diffusion of gases were to induce a man to get on an engine filled with gunpowder and then light it, or were to get him to enter a balloon and then throw him out from a great height, and if the man were in either case to die or be grievously hurt, the man of science would assuredly be answerable to the criminal law. On what principle then or authority is a man to be dispensed from the usual necessity of care, from the usual regard for human life merely, because he believes in the existence of some extraordinary and supernatural course of events? I can see none. *Salus populi, suprema lex*. The believer in miracles must, before he proceeds to imminently dangerous actions, be as diligent, as careful, as full of good faith as anybody else. Before putting his belief to any irrevocable test, he ought to verify. The Penal Code describes reason to believe a thing "as having sufficient cause to believe it." For instance in the present case, however great may have been prisoner's belief in the miracle, he ought as the other witnesses did in the cases they depose to, as he says he intended to do himself, to have hedged on

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the event, to have had a rope and boat for the purpose of getting Maung Lu out by natural means in case the miraculous intervention did not occur. Every person no matter what his religious belief, is expressly made subject to the Penal Code, and that Code in section 299, and more particularly in section 300, assumes that whoever does an unlawful act and in so doing takes human life does it with a knowledge of the ordinary course of nature. Take Illustration C. A intentionally gives Z a sword cut or club wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death." So the snake-charmers who got some men to let themselves be bitten by snakes, from which bites the men died, were held guilty of culpable homicide, even though the snake-charmers were found to have honestly believed they could by some enchantments cure the bites. People who want to escape the criminal law ought, whether they believe in a natural or in a supernatural order, to verify their opinions. They stand before the law on an equal footing when they commit acts which are ordinarily unlawful. So where a man literally obeying the precepts of St. James, Chapter V, verses 14 and 15, refused to give medical comforts to a dying child, trusting to the efficacy of the 'anointing with oil in the name of the Lord' and in prayers and the child died, it was held by five judges at the Queen's Bench (*Regina v. Downes* L. R. I. Q. B. 25) that the man was properly convicted of manslaughter, his neglect being culpable on the statute. The cases about gross negligence and surgical operations, whether conducted by surgeons or amateurs, blacksmiths, and others stand on the same footing. Men must act with ordinary circumspection and on reasonable beliefs, although, so long as they confine themselves to mere belief and do not proceed to action or omission, they may hold what beliefs they please. It was argued that the act done did not come within section 299 of the Penal Code. I follow the Bombay Judges in thinking this section must be read with section 300 (see L. L. R., 1 Bom. Series, page 342) and am of opinion that culpable homicide has been committed and that under clause 4 of section 300 it would have amounted to murder except for the consent given by deceased. I do not suppose that prisoner had altogether given up his belief in a natural order. I think he must have known that 'the act was so imminently dangerous that it must in all probability cause death' and that the words 'in all probability' must be taken objectively, i.e., with reference to the facts of the world in which we live, not with reference to prisoner's mere opinion or belief about them. I am glad Mr. Benamy stood counsel for the prisoner and argued the case fully, as it is an extraordinary one, the witnesses living in a world of ideas so different from our own. I think this decision will protect human life without interfering with the liberty of opinion, and I remark particularly that no authority for a contrary judgment has been shown me. I have only to add that I do not think it clear that San Win was the chief offender in this case, although his conduct is somewhat suspicious.

On the view I take of prisoner's state of beliefs a severe sentence is not called for. I cannot, however, abstain from nothing that prisoner acting on a mere theory, the information about miracle carelessly acquired from one San Win, according to prisoner's own account, went the extreme length of pushing Maung Lu over board. He was so credulous as to believe in these miracles of tattooing without having one ascertained case before him. But it is vain to expect much of the judicial or scientific spirit from a man like him fresh from native Burma and brought up to believe as much in angels and devils as in men and women.

Under all the circumstances I differ from the three assessors. I convict the prisoner of culpable homicide not amounting to murder and sentence him to three years of rigorous imprisonment under section 304 of the Indian Penal Code.

 Penal Code—304—324, 325.

Penal Code—304—324, 325.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS

 v. { (1) NGA PO THIT.
 (2) NGA BA GYWE.
 (3) NGA PO U.

Maung Kan Baw—for respondent.

 Criminal Revision
 No. 556 of
 1899.
 July
 17th.

Culpable homicide not amounting to murder - Dangerous weapons—Grievous hurt.

The accused were convicted of causing hurt with dangerous weapons by beating one Po Thit with sticks. Po Thit died in consequence.

Held—that, under the circumstances, the accused should have been convicted of culpable homicide not amounting to murder;

Held also—that the expression “an instrument which, used as a weapon of offence, is likely to cause death” should be construed with reference to the nature of the instrument, not the manner of its use.

References:—

1, U. B. R., 1892—95, page 211.

Mayne's Criminal Law of India, 584.

THE accused, Po Thit, Ba Gywe, and Po U, have been convicted of voluntarily causing hurt with dangerous weapons and have been sentenced each to suffer rigorous imprisonment for three months. They have been called upon to show cause why their sentences should not be enhanced. They have shown cause through their Advocate who has, I think, advanced all available pleas on their behalf.

At the trial, the principal witnesses for the prosecution did their utmost to obscure the case. Their sympathies were entirely with the accused. In consequence, the full and precise details of the occurrence have probably not been disclosed. There is, however, some evidence of what really occurred and this is supplemented by the confessions of the accused.

It seems that the deceased, Po Thit, under the influence of *Tari*, went up into the house of Maung Cho and Ma On, parents of the accused Po Thit. There he had some quarrel with Ba Gywe, accused, and stabbed him with a clasp knife, inflicting a slight wound on the thigh. Maung Cho and Ba Gywe then seem to have left the house. The former went to report to the police. The latter returned with the other accused, Po Thit and Po U, and the three inflicted a severe beating on the deceased with sticks. He was found by Maung Cho covered with blood. The surgical examination revealed five contused wounds on the head. Of these one was dangerous, the deep temporal artery being completely divided. The others were slight. The Hospital Assistant did not consider the wound so imminently dangerous that it must in all probability cause death. But as a matter of fact death ensued at about 1 o'clock next morning, and it was due to hæmorrhage consequent on the division of the artery.

On these facts, the Sessions Court convicted the accused of causing hurt with a dangerous weapon, acquitting them of the charge of culpa-

 Penal Code—304—324, 325.

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ble homicide. Holding that there was provocation, the Court passed only a lenient sentence.

I am not at all satisfied that the accused should not have been convicted of culpable homicide. When three men severely beat another on the head with sticks, it is reasonable to hold that they know that they are likely to cause death; and this is all that section 299, Indian Penal Code, requires. The reason given by the learned Additional Sessions Judge for holding that culpable homicide could not have been committed is based on considerations relevant to the wording of section 300, Indian Penal Code, which defines "murder," not that of section 299, Indian Penal Code, which defines "culpable homicide." I agree that the accused could not have been convicted of murder; but I think that they should have been convicted of culpable homicide. The case is in some respect similar to that of *So Ya*,* for one blow at least must have been delivered with considerable force. As, however, the accused have been formally acquitted of the charges under section 304, Indian Penal Code, and as there is no appeal in this case, I do not think that I can properly convict them under that section.

As regards the conviction under section 324, Indian Penal Code, I have to remark that this section requires the hurt to be inflicted by an instrument which, used as a weapon of offence, is likely to cause death. If the Additional Sessions Judge thought the sticks with which the deceased was beaten instruments likely to cause death, it is difficult to see how he could logically acquit the accused of the offence of causing death by an act done with the knowledge that it was likely to cause death. I think, however, that sticks such as those produced are not instruments which would ordinarily cause death; and this seems to me the proper interpretation of section 324, Indian Penal Code. A man may know that he is likely to cause death though the instrument may be one which would not ordinarily have that effect. Here it was not the nature of the instruments, but the manner of their use which rendered a fatal result probable.

Assuming that the accused are entitled to the benefit of their acquittal under section 304, Indian Penal Code, I am of opinion that they should have been convicted under section 325, Indian Penal Code, of the offence of causing grievous hurt. Mr. Mayne remarks: "If a person intends to cause simple hurt, but uses means which are, and which he ought to have known were likely to cause grievous hurt, and grievous hurt follows, he will be punishable under section 325."† In the present case I hold that the accused knew that they were likely to cause death. *A fortiori* they knew they were likely to cause grievous hurt; and as not only grievous hurt but death ensued, they should be convicted under section 325, Indian Penal Code.

* 1, U. B. R., 1892—96, page 211. | † Mayne's Criminal Law of India, § 11.

Penal Code—304—324, 325.

As regards the sentences passed, it may be admitted that there was provocation though the precise circumstances under which Ba Gywè received a wound have not been made clear. But the action of the accused was not taken in self-defence, nor even in immediate retaliation for the wound. Ba Gywé apparently left the house and returned with at least two companions and deliberately and brutally assaulted the deceased. There seems to be little excuse for this course of conduct. The sentences passed by the Sessions Court are quite inadequate.

I alter the convictions of the three accused to convictions under section 325, Indian Penal Code, of voluntarily causing grievous hurt. Taking into consideration the fact that Ba Gywé received some provocation, I enhance the sentences on Po Thit and Po U to rigorous imprisonment each for three years, and the sentence on Ba Gywé to rigorous imprisonment for two years.

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 Penal Code—304A, 323.

Penal Code—304A, 323.

Before H. Adamson, Esq.

QUEEN-EMPRESS v. NGA NI.

Criminal Revision
No. 261 of
1899.
May
1st.

The deceased and accused, who were brothers, had a quarrel in the course of which the accused, who was sitting on the ground, picked up a teak board 23 inches long, 4 inches wide and $\frac{1}{2}$ inch thick, which was lying near, and holding it in one hand, without rising from the ground, struck the deceased with the flat side, once on the back and once on the head, from the effects of which he died.

The accused was convicted under section 304A, Penal Code, and sentenced to two years' rigorous imprisonment. The Sessions Judge reported the case, pointing out that the conviction was under a wrong section.

Held—that section 304A did not apply to a case in which the act itself was unlawful and amounted to the voluntary commission of an offence against the person. Personal injury intentionally caused is neither a rash nor negligent act. When an act of violence which is itself an offence has been committed, the nature of the offence depends on the knowledge of the offender.

In the present case the offence was voluntarily causing hurt, section 323, Indian Penal Code.

THE Sessions Judge has now resubmitted the proceedings as no appeal has been presented. The deceased and accused, who were brothers, had a petty quarrel. Accused, who was sitting on the ground, picked up a teak board 23 inches long, 4 inches wide and $\frac{1}{2}$ inch thick, that happened to be lying near, and holding it in one hand without rising from the ground, hit deceased with it once on the back and once on the head. Deceased hung down his head, complained of dizziness, and soon after became unconscious. Accused at once gave him all the assistance that was possible. Deceased was taken to the hospital, where he died ten days later. A *post-mortem* examination revealed a clot of blood below the skull cap. Death was caused by pressure of this clot on the brain. The clot was the result of the rupture of a blood vessel caused by the blow on the head. From the absence of external marks on the head the medical witness deduced that the blow had been struck with the flat side of the board. The Magistrate convicted the accused under section 304A, Indian Penal Code, and sentenced him to rigorous imprisonment for two years.

The Sessions Judge has reported the case for orders, pointing out that the conviction is under a wrong section. This is quite clear. Section 304A does not apply to a case in which the act itself is unlawful and amounts to the voluntary commissions of an offence against the person. Personal injury intentionally caused is neither a rash nor a negligent act. When an act of violence which is itself an offence has been committed, the nature of the offence depends on the knowledge or means of knowledge of the offender. When a man in a sitting posture, using only one hand, strikes another on the head one blow with the flat side of a small board of the kind described, it

Penal Code—304A, 323.

appears to be clear that he could have had no intention to cause or knowledge that he was likely to cause more than ordinary hurt. The act does not amount to culpable homicide because it is not done with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that death is likely to be caused by the act. It does not amount to voluntarily causing grievous hurt, because accused did not intend to cause or know that he was likely to cause grievous hurt. The conviction should therefore be of voluntarily causing hurt, section 223, Indian Penal Code.

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v.
NGA NI.

In cases where death results from an unlawful act of the accused, Magistrates should be most careful not to absolve the accused from the graver charge and convict him of the minor. Unless it is absolutely clear that the offence cannot amount to murder or culpable homicide, the accused should be committed to the Sessions. And even when it is clear that only the minor charge will stand, such cases should as a rule be tried only by the District Magistrate.

I alter the conviction into one under section 323, Indian Penal Code, and reduce the sentence to rigorous imprisonment for one year.

Penal Code—323, 325.

Penal Code—323, 325.

Criminal Revision
No. 710 of
1901.
Sept.
27th.

Before G. W. Shaw, Esq.

KING-EMPEROR v. NGA TOK HLA.

Grievous hurt—Voluntary causing of—Intention or knowledge inferred from nature and extent of injury—Accused entitled to benefit of doubt.

The accused, who was a young man, was jealous of his wife, whom he suspected of being in love with the complainant, and a month before the occurrence in question had forbidden her to speak to him. He had also forbidden the complainant to come to his house.

On the night of the 22nd April complainant and three companions went to accused's house and, as they say, sat down and had a short conversation with accused's wife. Accused wanted to know who the visitors were and after ascertaining told his wife that two of complainant's companions might come in, but nobody else, and complainant was not to be admitted. Complainant heard this from outside and began to abuse accused. Accused's father went out and remonstrated with him, and while he was doing so, accused, who had picked up a stick in the house, came out with it and struck complainant on the head, which felled him to the ground unconscious and kept him 54 days in hospital, unable to follow his ordinary pursuits. The weapon said to have been used was produced, but its only description was "one bamboo stick." The hurt caused was grievous. The Magistrate assumed that the accused intended or knew himself to be likely to cause grievous hurt (section 322, Indian Penal Code).

Held,—that there was nothing to show that accused had this intention or knowledge. The intention or knowledge could only be inferred from the nature and extent of the injury and on this point the accused was entitled to the benefit of the doubt.

Conviction altered from section 325 to one under section 323, Indian Penal Code.

THE respondent, Tôk Hla, has been called upon to show cause why the sentence of imprisonment, till the rising of the Court, passed upon him by the Subdivisional Magistrate, Pyinmana, under section 325, Indian Penal Code, should not be enhanced. All he has to say is that on the evidence the case fell under section 335, Indian Penal Code, and that a light punishment was appropriate.

The evidence leaves no doubt about the facts. Respondent, who is a young man of 21, was jealous of his wife, whom he suspected of being in love with Nga Pu, the complainant and a month before the occurrence in question he had forbidden his wife to speak to Nga Pu. He had also, he says, forbidden Nga Pu to come to the house.

On the night of the 22nd April last Nga Pu and three companions went to the house and, as they say, sat down and had a short conversation with respondent's wife Mi Pan Yon. She says they came in after bed-time and when there was no light burning and left as soon as she lighted a lamp. It may not have been so late as this, because the offence in question was reported to the headman, as he states before bed-time. But any way it was somewhat late in the evening and respondent was anxious to know who the visitors were; so his wife went out and called in one of them, Po San, a relation, who was questioned as to his companions according to respondent and his wife.

Penal Code—323, 325.

Whether this was so or not, it seems probable and leads to the conclusion that Nga Pu and his companions had not been sitting talking in the house as they say. The respondent anyhow told his wife that Po San and Ye Gyan (another of the party and, like Po San, a relation) might come in, but nobody else, and Nga Pu was not to be admitted. Nga Pu heard this from outside and began to abuse respondent and called out that he did not want respondent's wife or old wife. Respondent's father went out and remonstrated and while he was speaking to Nga Pu respondent, who had picked up a stick in the house, came out with it and struck Nga Pu a blow on the head, which felled him to the ground unconscious and kept him 54 days in hospital, unable to follow his ordinary pursuits. A lacerated wound $2\frac{1}{2}$ inches long by half an inch broad and bone-deep was caused and what he was suffering from when he reached the hospital next morning was "shock." His condition was considered by the Hospital Assistant to be critical and his deposition was taken.

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v.
NGA TÔK HLAU.

The weapon said to have been used was produced, but as its only description is "one bamboo stick," the omission to prove that it was the weapon used is of little consequence.

The hurt caused was grievous. The Magistrate assumed that respondent intended or knew himself to be likely to cause grievous hurt (section 322, Indian Penal Code).

There is nothing to show that respondent had this intention or knowledge. The intention or knowledge can only be inferred from the nature and extent of the injury. On this point therefore I think the respondent is entitled to the benefit of the doubt and I alter the conviction from one under section 325 to one under section 323.

The plea of provocation will not stand, because it is plain that it was not grave and sudden enough to entitle the respondent to the benefit of the law on this point.

If Nga Pu had been caught in company with respondent's wife in suspicious circumstances, grave and sudden provocation might perhaps have been admitted, but here the provocation was mere abuse uttered in response to respondent's own remarks directly or indirectly referring to Nga Pu, and respondent was inside his house at some distance from Nga Pu, who was outside on the road.

I enhance the sentence to one of rigorous imprisonment for three months.

 Penal Code—324.

 Penal Code—324.

Criminal Revision
No. 262 of
1900.
April
23rd.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. { NGA SEIK.
 NGA SAN BA.
 NGA SAN MYA.

Hurt caused by lethal weapon—Constituents of offence—Medical evidence.

The accused were convicted under section 324, Indian Penal Code, of "voluntarily causing hurt with dangerous weapon."

Pointed out—that the charge should have followed the wording of the section.

Also—that medical evidence should have been recorded to ascertain the nature and extent of the hurt caused.

Held—that the character of an accused person may fitly be taken into consideration in fixing the measure of punishment, but there must be discretion in the matter.

THE case calls for several remarks.

In the first place the Magistrate acted with obvious and inexcusable illegality in not allowing bail on 2nd January. The reason for the application, that the accused were charged, under section 324, Indian Penal Code, was a good reason why the Magistrate was bound to allow bail. An offence under section 324, Indian Penal Code, is bailable, as the Magistrate will see by reference to Schedule II of the Code of Criminal Procedure, which, it is presumed, he omitted to consult. By section 496, Code of Criminal Procedure, the Magistrate was therefore bound to allow bail. He had no option in the matter; and it was illegal and unjust to refuse the application. From the curt order recorded by the Magistrate, it might be supposed that the grant or refusal of an application to be admitted to bail was a matter to be decided according to the Magistrate's caprice.

No medical evidence was taken. It is difficult to see how the Magistrate could come to a reasonable conclusion as to the extent and nature of the hurt caused, and the gravity of the case without taking such evidence.

He has charged and convicted, the accused of the offence of causing hurt "by means of dangerous weapons." There should, it may be remarked, have been a separate charge for each accused. Also there is no such offence as that specified in the charge. The charge should have been of causing hurt, "by means of an instrument which, used as a weapon of offence, was likely to cause death, namely" The attention of the Magistrate would then have been attracted to the essential part of the offence and he would have seen the necessity of finding that the instruments used were such as were likely to cause

Penal Code—324.

death and of giving reasons for his finding. The instruments used were apparently bamboos from an inch to an inch and a half thick. Ordinarily I think these are not instruments likely to cause death. The convictions should have been under section 323, Indian Penal Code.

QUEEN-EMPRESS
v.
NEA SEIK.

The Magistrate apparently passed a serve sentence on San Ba, because he had been recently convicted of theft. I agree that the character of an accused person may fitly be taken into consideration in fixing the measure of punishment. But there must be discretion in the matter; and some cases show that discretion is not always duly exercised. I have recently seen a case in which a Magistrate in sentencing a man for rape apparently took into consideration the fact that *the accused's brother was undergoing imprisonment for cattle-theft*. That was a wrong exercise of discretion as to the facts to be taken into consideration in awarding punishment. Similarly, I think that in this case, which was one of an obviously unpremeditated assault, a previous conviction for theft could not fairly be considered for the purpose of affecting the punishment. The assault seems to have been a somewhat severe one and I think a sentence of imprisonment was appropriate. But a term of six months was excessive in the case of San Ba when his father, the principal offender, was sentenced to imprisonment for one month only.

The Magistrate has recorded that "for various reasons" he does not believe a word said by three witnesses for the defence. The remark is injudicious and unjudicial. In any case, even if it were justifiable the "various reasons" should have been set forth. No reason whatever is assigned for disbelieving these men.

San Mya was apparently present abetting the assault, according to the Magistrate's finding. In that case, he should have been treated as a principal under section 114, Indian Penal Code. It is not quite clear what part the Magistrate supposes him to have taken. He is not mentioned in the judgment as having done anything, but rapidly follow his father Maung Seik. As he did not appeal, though he had an opportunity of doing so, I do not think it necessary to interfere in his case.

I reduce the sentence on San Ba to one of imprisonment for the term, rather more than three months, which he has already undergone.

Penal Code—330.

Penal Code—330.

Criminal Revision
No. 1035 of
1897.
November
18th.

Before G. D. Burgess, Esq., C.S.I.

NGA PO MYA *v.* QUEEN-EMPRESS.

Mr. S. C. Dutta—for applicant.

Mr. H. M. Litter, Government Prosecutor—for the Crown.

Penal Code, 330—Extortion of confession by Police Officer by means of hurt—
Gravity of offence—Sentence enhanced.

THE accused, a sergeant of police, was convicted under section 330, Penal Code, and sentenced to three months' simple imprisonment for causing hurt to a prisoner in his custody for the purpose of extorting a confession.

No appeal lying, accused applied for revision and his application was admitted for hearing, and he was at the same time called upon to be prepared to show cause why the sentence should not be enhanced if the finding were upheld.

After full consideration of the evidence, so as to give accused the same advantage as in an appeal, the conviction was maintained as substantially unassailable, and the sentence was enhanced to rigorous imprisonment for two years for the reason that the offence found to have been committed was of the gravest character, and such as to shake judicial confidence in a most important portion of the evidence which has commonly to be relied on by Courts of justice, namely, the genuineness and trustworthiness of early confessions, for such evidence ought to be free from the slightest taint, and to tamper with it is to pollute justice at the source.

Held—that when an offence like the present, in which clear proof is generally most difficult to obtain, is satisfactorily established, as in this instance, an exemplary and deterrent sentence is demanded for the protection of the people, of prisoners, and of the interests of justice, and the duty of inflicting it cannot be neglected.

JUDGMENT OF DISTRICT MAGISTRATE.

THE accused, sergeant of the Manlè thana, is charged with causing hurt to one Nga Sun or Nga Zun, whilst confined there, for the purpose of extorting a confession from him that he was concerned in an attempt at robbery at Kyundaung village in the Tigyaing township last April. As a matter of fact, he did make such a confession on 18th April to the Manlè Myoók. He was tried and discharged on 14th September by the Subdivisional Magistrate, Katha, and in consequence of the Subdivisional Magistrate bringing what transpired there personally to my notice, the present accused was suspended and his trial ordered.

The facts are as follow :—

In consequence of information given by one Mo Thi the accused went down to Kyundaung village, Wuntho township, and arrested Nga Zun at his house, and took from it certain property. (None of this has, I understand, been identified as stolen property.) Nga Zun was brought back to Manlè, arriving there about 6 P.M. on 17th August. According to Nga Zun's evidence, he went to sleep and was awoken some time in the night, handcuffed, and taken out of the thana to the kitchen, where he was tied to a post by a chain through the handcuffs. The accused, with whom where two other men, asked him if he attacked Kyundaung. On his replying in the negative, the accused kicked him in the back, knocking him down. The accused then twisted bits of his hair out with a bamboo, and kicked him on the head, which he had first enveloped in his *pawa*. Nga Zun called out "help! help!" and was rewarded with a blow in the mouth which loosened three of his front teeth. (I have seen myself that three of them are loosened, evidently by a blow.) Nga Zun

Penal Code—330.

says that he then made a confession as desired by the accused, which was taken down by the latter on the spot. The only other occupant of the cage was one Shwe Yôn, now committed to the Sessions on a charge of murder. Nga Zun told Shwe Yôn how he had been treated and the latter corroborates him. It should be added that Nga Zun picked up some of his hair which was pulled out, and the hair (Exhibit 1), he says, is it. He also produces the *pawa* he wore. There are stains apparently of blood on it, which he says came from his mouth.

The next morning, on the way to the Court, he says the accused read over what he had written 17 or 18 times and told him to speak to the Myoôk accordingly. Nga Zun says that the accused was present when he made the confession (Exhibit A) in the court-house, and although the accused denied this both on oath before the Subdivisional Magistrate and incidentally when cross-examining Nga Zun, Maung Gyaw, the Manlè Myoôk, admits this very improper arrangement was allowed.

After confessing, Nga Zun was taken to Tigyaing *via* Katha, where he complained both to the Myoôk and the Subdivisional Magistrate about the treatment he had received. (The Tigyaing Myoôk informed me verbally there that this is so, but as I see no reason whatever to doubt the accused's testimony on this point, I have not called him as a witness.)

The accused denies ill-treating Nga Zun and says that he examined him in the thann at about 7 or 8, and has called several constables and others as witnesses, who have perjured themselves in divers ways.

Constable Maung Po, the first witness, says Nga Zun was examined at 2 A.M., but admits that he told Inspector Po Thein, who, under my orders, investigated the matter, that he was examined at 7 P.M.

Constables Tun Hla and Po Tin (1) say that the examination took place at the latter hour, but Po Tin (1) admits that he told the Inspector falsely that it took place at 12 o'clock (midnight). Po Kyit and Paw Din both adhere to the 7 o'clock version. The latter, who says he was down with fever, adds that he kept the key of the cage under his pillow, and was woken up every two hours when the sentries changed, which I do not for a moment believe.

One Nga Lôn says that he with his brother-in-law Mo Thi, were called to the sergeant's house about 8 P.M. and were with him there till after midnight, going over stolen property, &c. This evidence I have no doubt is true, so Mo Thi was not examined. Two constables give evidence about searching Nga Zun at different times, but from what I know of the police, I consider that Nga Zun would have little difficulty in getting the tuft of hair (Exhibit 1) through if he wanted. I have called the guard writer Po Din (2) as there is a curious erasure about Nga Zun's examination in the general diary. Po Din's (2) explanation may perhaps be accepted as to this, but it is clear that the entries in the general diary for that night are quite valueless for purposes of evidence. Po Din (2) also produces the accused's note-book (Exhibit C), which I called for as it was not brought here.

Now in considering the evidence in this case, it may be at once said that Nga Zun and Shwe Yôn might have a prejudice against the accused, and also that there is a discrepancy in their evidence as to when a light was lit on the occasion of the beating and the time between it and dawn. On the other hand, there is nothing in the circumstances of the case in which Shwe Yôn is charged suggest to any mental depravity on his part. As to the point about the light, I think it was quite possible it was lit sooner than Nga Zun says, and that it is highly probable that under the circumstances he did not notice it. As to the time between the occurrence and dawn a possible doze on Nga Zun's part would quite throw his calculations out. After scrutinizing Nga Zun's and Shwe Yôn's manner and they gave evidence in Court, I am quite of opinion that they are telling the truth, and in my opinion, the discrepancies noted merely show the absence of collusion between them, which on other grounds, is probable. Again, if the accused is not guilty, it is difficult to understand the false evidence for the defence, which on that supposition would be absolutely purposeless. The manner of giving evidence by all the

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constables produced for the defence impressed me unfavourably and indeed the accused's advocate (Mr. D'Silwa) did not attempt to lay weight on their testimony. In my opinion the accused, after taking Nga Zun to Manle went to his own house, where shortly afterwards he spoke with Nga Zun, Mo Thi and others concerning the property seized and other matters till past midnight, when he returned to the thana and extorted a confession from the accused.

In the accused's note-book (Exhibit C) information given by Mo Thi is recorded, first on 17th August 1897 and immediately after Nga Zun's confession. The accused says that Mo Thi's information was really written on the 15th August 1897, but from internal evidence I do not believe this for a moment. This clinches the case against the accused, as it shows that Nga Zun must have been examined after midnight (*vide* Maung Lôn's evidence).

I have given this case very careful consideration, and I am sorry that, after seeing the witnesses, watching the manner in which they gave their evidence, and considering that evidence, I must find the accused guilty. In my opinion Nga Zun (who, be it remembered, is an average Burman villager and not a native of India) is telling absolutely the truth in his evidence. It is corroborated in all essential particulars by Shwe Yôn, who, in spite of the charge against him, seems a respectable old man, while the defence is transparently false. Judging from the accused's work, I have no doubt that he was prompted to extort the confession solely by a desire to do a smart job and so bring his name forward. In spite of the fact that he has a good record, I must pass on him a sentence of imprisonment as extorting confessions, though common enough under the Burmese *regime* and even during the early times of the annexation, is a thing that must be sternly put down.

FINDING:—The Court finds that Po Mya, son of Maung Pe, is guilty of the offence specified in the charge namely, that he has committed the offence of causing hurt for the purpose of extorting a confession, and has thereby committed an offence punishable under section 330 of the Indian Penal Code and the Court directs that the said Po Mya be simply imprisoned for three months.

ORDERS IN REVISION.

THIS application for revision has been made because no appeal lies in the case, and the first ground stated in the petition is "that the 'learned District Magistrate has erred in not passing an appealable sentence."

That means, of course, that an appeal should be allowed in such a case, and not that a more severe sentence ought to have been imposed.

This objection has now been removed by going through the evidence and hearing the application in the same way as if the case were an appeal.

The evidence and the findings of facts upon it are set out in the full judgment of the District Magistrate.

The evidence is transparently clear, and the only question can be whether it is trustworthy, the defence being palpably false on the face of the record.

Some discrepancies are pointed out, but they are either trifling or capable of reconciliation, as in the instance of that about the light which the District Magistrate discusses. No importance need be attached to them.

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The delay of the complainant Nga Zun in making his complaint is perfectly intelligible. While the influence of the torture was fresh he would, of course, not venture to make enemies of the police in whose custody he still was. After he got away from them he complained.

There is an error in the District Magistrate's judgment in stating that the confession of Nga Zun was made on the 18th April. April should be August. The date 18th is right, as a reference to the original shows, a mistake having been made in the copy on record, which bears the date 28th August.

The only doubt to be felt in the matter is whether Nga Zun and Nga Yôn, who was his fellow-prisoner and the corroborating witness, might not have conspired to tell a false story to save themselves, Nga Yôn having also made a confession in the case against him, which he has since withdrawn as made under the inducement of the accused police sergeant.

With the consent of applicant's learned advocate the proceedings in Nga Yôn's case have been referred to, so as to avoid the necessity of requiring further evidence being taken in the Court below, and from them it appears that the witness Nga Yôn, in the case before the committing Magistrate at Katha, was examined on the 21st August and then adhered to the original confession he had made.

Now Nga Zun had been taken to Tigyaing, where he complained first on the 22nd August, so that there could be no collusion between him and Nga Yôn, the latter of whom had not at that time challenged the accused's proceedings at all.

It is impossible to believe therefore that the present charge against accused is the outcome of the attempts of two accused persons to rid themselves of the embarrassment of their own confessions by bringing false charges of mal-treatment against the police.

That is the only risk I can see to be guarded against in the case. All other circumstances go to confirm the truth of the story for the prosecution, as is quite correctly pointed out in the District Magistrate's judgment.

The conviction being found right, the sentence has now to be considered. That passed is a very light one indeed, and the applicant-accused has been called upon to show cause why it should not be enhanced in the event of the conviction being sustained, and he has forwarded a petition to supplement his learned advocate's representations.

Certificates have also been produced exhibiting creditably good service in the police force. After considering all these, I am unable to let the sentence stand as it is.

The offence found to be proved is of the gravest character. It is such as to shake confidence in a most important portion of the evidence which has commonly to be relied upon by courts of justice, namely, the genuineness and trustworthiness of early confessions.

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Such evidence ought to be free from the slightest taint, and to tamper with it is to pollute justice at the source.

There is only too much reason to fear that confessions are sometimes extracted by improper means, and it is necessary to do everything possible to render such occasions as infrequent as may be.

Such a punishment as the present is altogether inadequate for the purpose.

Where an offence like this, of which clear proof is generally most difficult to obtain, is satisfactorily established, as it is here, an exemplary and deterrent sentence is demanded for the protection of the people, of prisoners, and of the interests of justice, and the duty of inflicting it must not be neglected.

Having regard to the good opinion of accused's character and conduct hitherto entertained, I do not impose the full measure of punishment that so serious a crime would ordinarily deserve.

The application for revision of the conviction is accordingly dismissed, and the sentence on accused Nga Po Mya is enhanced to one of rigorous imprisonment for two years.

 Penal Code—354.

 Penal Code—354.

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS v. NGA CHIT KYU.

Penal Code, 354—Assault or use of criminal force to a woman with intent to outrage her modesty—Attempt at rape.

*Criminal Revision
No. 464 of
1896.
May
22nd.*

The accused was convicted under section 354, Penal Code, and sentenced to suffer three months' rigorous imprisonment.

The prosecutrix gave the following evidence:—

"I knew accused Maung Chit Kyu. We live in the same village, but I knew him since the occurrence of this case. I was in my house 4th *Losók* of *Pyatho* (corresponding with the 21st January). I was in my house on the night. I went to answer to the call of nature at 7 P.M., alone. While I was there the accused came to me. The spot was about 100 feet or so from my house. He asked me to love him. I replied that I did not love him as he is a married man. He then said that he would stab me if I don't love him. He had a *da* in his hand. He seized my right hand first and threw me down. I seized his hair then and he ran away, leaving his turban behind. He came over my body after he pushed me down and pulled off my waist cloth. He did not attempt to rape me. I called out *ထောင်စုချားလာကြပါလူပုလူ* then only the people from the village came. The accused then went towards Maung Po Chit's (the brother-in-law of the thugyi) house and then he was chased after by villagers. We found him at Maung Po Chit's house and a report was made to thugyi Maung Shwe Zin. On the following day I came and reported the matter to the Police."

Pointed out—that the Magistrate should not have tried the case, since by the complainant's own account it was obviously an attempt at rape as nothing but common sense was needed to see, and that evidence could not be ignored if the complainant was to be treated as a credible witness.

But it would probably have been more discreet not to have believed at all a story no better supported which it was so easy for the woman to tell in her own interest and so hard for the man to refute by anything but his own denial.

References,—

1, U. B. R., 1892—1896, page 229.

1, U. B. R., 1892—1896, page 231.

The accused has not appealed, but nevertheless it would have been more discreet not to have convicted in a case of the kind.

What happens on these occasions of course is that the man and woman have an intimacy which the woman fears some one has detected, and she then accuses the man of acting against her will in order to throw a cloak over her own lasciviousness. The man being a Burman, ignorant of the law, imagines that he has broken it by having anything to do with the woman and therefore submits to punishment.

Besides such considerations, however, the Magistrate should not have tried the case, which by the complainant's statement was an attempt at rape. This has been so often pointed out that the Magistrate can scarcely have any excuse in the matter, except that he has misconceived the

Penal Code—354.

QUEEN-EMPRESS meaning of the word 'attempt.' It should hardly be necessary to
NGA CHIT KYU. ^{7.} remark that if a man treats a woman as accused is declared by com-
plainant to have treated her, his act cannot possibly be of any other
character than an attempt to ravish.

Common sense without any knowledge of law is sufficient, or ought
to be sufficient, to make this plain to any understanding.

 Penal Code—354 $\frac{376}{511}$

 Penal Code—354 $\frac{376}{511}$

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS v. NGA MYA.

Penal Code, ss. 354 $\frac{376}{511}$ —Assumption of jurisdiction by treating offences under latter section under former—Inadequacy of punishment.

*Criminal Revision
No. 1524 of
1896.
February
9th.*

The accused was convicted under section 354, Penal Code, by a Magistrate of the first class, and sentenced to pay a fine of Rs. 50 or to suffer two months' rigorous imprisonment.

In revision the accused was called upon to show cause why the sentence should not be enhanced, but he could not be found.

Order in Revision.

THE District Magistrate does not think a serious offence could have been contemplated under the circumstances.

The case may therefore be dismissed and struck off.

What it is desired to impress on the convicting Magistrate is, that when evidence discloses the possible commission of an offence graver than he is himself competent to deal with, he should not attempt to dispose of the case on the chance of its being confined within his own jurisdiction, but should submit it for determination to the Court by which alone according to law the more serious offence is triable.

 Penal Code—363, 366.

 Penal Code—363, 366.

Criminal Revision
No. 844 of
1901.
September
9th.

Before G. W. Shaw, Esq.

KING-EMPEROR v. NGA PO SAW.

Under Buddhist law marriage contracted with a minor without parents' consent not valid—Sexual intercourse without such consent punishable under section 366, Indian Penal Code—Jurisdiction assumed by Magistrate by trying for a minor offence when major offence has been committed.

Accused was tried and convicted under section 363, Indian Penal Code, by the 1st class Magistrate of the Township and sentenced to four months' rigorous imprisonment. The minor was a Burmese girl aged 15 years and three months, who stated that she went of her own accord and that she was accused's wife.

Pointed out,—that Magistrates should not give themselves jurisdiction by trying cases under section 363, which really fall under section 366, Indian Penal Code. The form of kidnapping which is punishable by section 366, Indian Penal Code, is a seriously aggravated form which only Sessions Courts and District Magistrates in the exercise of their special powers have jurisdiction to try.

Held—that under Buddhist law, a man cannot contract a valid marriage with a minor without her parents' consent and therefore sexual intercourse without such consent is "illicit intercourse" within the meaning of section 366, Indian Penal Code.

Reference,—

S. J., L. B., page 202.

ACCUSED, Po Saw, was tried and convicted under section 363, Indian Penal Code, by the 1st class Magistrate of the Township, and sentenced to four months' rigorous imprisonment.

The minor was a Burmese girl aged 15 years and three months, who states that she went of her own accord and that she is the accused's wife.

The accused who is 21, states that the girl came of her own accord, because they loved each other and that they are living as man and wife at his parents' house.

It has been repeatedly pointed out that Magistrates ought not to attempt to give themselves jurisdiction by trying a case under one section of the Indian Penal Code when it really falls under another. It has been held, for example, that Magistrate should not try cases under section 354 which really fall under section 376, or cases under section 417 that really fall under section 420. Similarly, they should not try cases under section 363 which really fall under section 366. The form of kidnapping which is punishable by section 366 is a seriously aggravated form, which only Sessions Courts and District Magistrates in the exercise of their special powers have jurisdiction to try.

It has been held by the High Court of Lower Burma that even if marriage is intended, a man who kidnaps a Burmese Buddhist minor from lawful guardianship with a view to sexual intercourse is guilty of an offence under section 366 (see *Queen-Empress v. Ne U* *).

* S. J., L. B., page 202.

Penal Code—363, 366.

The question does not appear to have been directly decided in Upper Burma. But it may perhaps be inferred from the orders passed in Criminal Revision cases Nos. 771 and 932 of 1897 of this Court, that the Lower Burma ruling was not then dissented from.

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v,
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The reasoning on which this ruling is based, namely, that, under Buddhist law, a man cannot contract a valid marriage with a minor without her parent's consent, and therefore sexual intercourse without such consent is "illicit intercourse" within the meaning of section 366 appears to be sound, and I am of opinion that it should be followed unless or until it is expressly overruled or dissented from.

As the case has not been argued before me I refrain from pronouncing a more definite decision.

Following the practice of my learned predecessor in the cases just referred to, I shall not interfere in this instance with the conviction or sentence.

 Penal Code—366.

 Penal Code—366.

Before G. D. Burgess, Esq., C.S.I.

NGA KU AND TWO OTHERS v. QUEEN-EMPRESS.

Mr. C. G. S. Pillay—Advocate for applicants.

Criminal Revision
No. 808,
1897.
September
3rd.

Penal Code 366—Abduction of women with intent that she may be compelled to marry against her will—Kidnapping—Common views and habits of Upper Burmans as to parental rights in matters relating to the marriage of their children—Their notions of domestic authority—Foundation of such notions—Regard to be had to them in determining the measure of punishment for offences connected with marriage and the abuse of parental power under English law. Main object of punishment—General Principles to be followed in awarding the punishment of imprisonment—Illegal sentence of imprisonment in default of fine.

Penal Code ss. 87, 361, 362, 366; Majority Act, 1875, s. 2; Manugye Dhammathat Chapter VI, 21-23; Wounana 133, 134.

According to the findings of the District Magistrate the prosecutrix, a young woman aged 18, was attached to a man, of whom her father, the first accused, disapproved. The father desired her to marry the second accused, brother of the third, and as she would not comply with his wishes he made arrangements for carrying them out in spite of her opposition.

Accordingly, very early one morning, the first accused, under pretext of paying a ceremonial visit to a *pōngyi*, started from his house in a cart with his whole family, consisting of himself, his wife, eldest son, daughter (the prosecutrix), and two younger children. On their way they were overtaken, while it was still dark, by another cart driven by the third accused. Into that cart the first accused ordered his daughter, the prosecutrix, to shift in order to give more room telling her that it was the cart of a well-known friend of the family. The girl did as she was bid and the cart drove off, and she did not discover the deception till her parent's cart was out of earshot.

After a little, the second accused came out of the jungle and got into her cart and the two brothers told the girl that her father had given her to be the wife of the second accused. On this prosecutrix began to struggle to get out of the cart, but the two brothers prevented and bound her wrists. She managed to undo the fastening and jumped out of the cart, but the two accused seized her, forced her back, and tied her hands behind her back. In this manner they proceeded some way, till, just as dawn was breaking they were met by two wood-cutters, who on prosecutrix's appeal for protection took the party to the headman of the neighbouring village.

Eventually the three accused were charged and convicted by the District Magistrate under section 366, Penal Code, of the offence of kidnapping the prosecutrix with intent to compel her against her will to marry the second accused, and were sentenced, first accused to two years' rigorous imprisonment and a fine of Rs. 100 or two years' further rigorous imprisonment in default, and the second and third accused to two years' rigorous imprisonment and a fine of Rs. 50 each or two years' further rigorous imprisonment in default.

The accused preferred an appeal to the Court of Session, which was rejected and they then made the present application for revision to the High Court.

In revision two points were argued on behalf of the applicants.

One was that the prosecutrix being under twenty years of age was still under the guardianship or control of her father, the first accused, in respect of her marriage, as laid down in the Manugye Dhammathat, Chapter VI, 21, 23, and

Penal Code—366.

the Wunnana, 133, 134, and reference was made to the case of *Queen-Empress v. Ne U*, Selected Judgments and Rulings, L. B., 202, where the Special Court of Lower Burma held that this rule of Buddhist Law was applicable in a prosecution under section 366, Penal Code.

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QUEEN-EMPRESS.

Held—on this point, that the question decided in the case of *Queen-Empress v. Ne U* was merely as to the necessity for the guardians' consent to marriage, and that therefore the decision had no relevancy to the present circumstances.

According to the Majority Act, 1875, eighteen was the age of majority. Section 2 of that Act left the personal law of every one unaffected in regard to capacity to act in the matter of marriage, but this was not a matter of marriage though connected with that subject, but a matter of personal rights under the criminal law and that law treated a person above the age of eighteen as having attained majority.

Penal Code, 87.

But whether a minor or not, and whatever a father's powers might be, they could not extend under English law to forcibly or fraudulently making a daughter accept a man in marriage against her will.

Accordingly the correctness of the conviction under section 366, Penal Code, after altering 'kidnapping' into 'abduction' could not be questioned.

The second point was to the severity of the sentences passed.

Held—that, having regard to all the circumstances of the case, and especially to the habits of thought acquired by the people under native administration which have not yet had sufficient time to undergo modification from the introduction of a more modern and civilized system of jurisprudence, the substantive sentence passed was unnecessarily severe.

It was accordingly reduced to one of nine months' rigorous imprisonment on each of the accused, the fines as originally imposed being maintained, but the alternative sentence of imprisonment in default being reduced as illegal to one of three months' rigorous imprisonment in each case.

Hard-and-fast rules concerning the measure of punishment cannot be laid down for all cases, but the apportionment of the penalty in each must be left to discretion and discretion has to be guided by a variety of considerations.

In awarding punishment the Courts are solely concerned with the nature of the act found to have been done viewed as a crime or breach of the law, and with the moral aspect of the matter they have in strictness nothing to do. The law indicates the relative gravity of the act by the maximum penalty provided for its punishment, and the Courts have to judge whether the offence committed falls short of the maximum degree of gravity, and, if so, by how much.

The principal object of punishment is the prevention of offences and the measure of punishment must, consequently, vary from time to time according to the prevalence of a particular form of crime and other circumstances. An amount of severity may be very appropriate at one time which would be quite uncalled for at another. It may generally be taken as a safe principle to follow, that punishments should be made as moderate as is consistent with the object aimed at. It is politically and economically a mistake to keep a man in prison longer than is absolutely requisite for his own reformation and for a warning to others.

The associations of a jail are liable to become demoralizing after a time, and therefore, where a short sharp sentence is likely to be sufficiently punitive and deterrent, it should be preferred, where possible and suitable, to a long term of imprisonment.

References :—

Bentham's Principles of the Penal Code, Chapters VI, VIII.

Maungye Dhammathat, Chapter VI, 21, 23.

Report on draft Penal Code.

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Selected Judgments and Rulings, Lower Burma, page 202.
Wunnana, 133, 134.

THE accused applicants have been convicted and sentenced in the following judgment:—

From the evidence of complainant in this case, it appears that the complainant, Ma Hlaing, was in love with one Po So of Dayegaung. The first accused, her father, did not approve of this attachment, and secretly arranged to marry the girl against her will to second accused, Maung Po Kyôk. It appears that the father made a pretence that, on the early morning of the 24th April, the whole family should go and worship and pay offering to a *pîngyi*; that the whole family, consisting of father, mother, eldest son, daughter, complainant, and two small children, started off in a cart with the offering from Dayegaung; they crossed the Samôn river and on getting to a *sayat* on the other side of the river, the girl, Ma Hlaing was directed to get into the cart of a well-known friend which they met. The girl did so, and the cart drove off. Shortly after the girl discovered that the cart was not that of the well-known friend, but that third accused was driving it. She began to call for her father and mother, who were nearest by them. Shortly afterwards, it still being quite dark, the second accused, Po Kyôk, came out of the jungle and gets into the cart, and thus the two brothers tell the girl that her father had given her to the second accused. The girl then commenced to struggle to get out, when the two brothers in a ruffianly way proceed to tie her wrists. She managed to undo the tie and jump out of the cart, but the two accused seized her and put her back into the cart and tied her hands behind her back. In this way they proceeded till they got to the north-west side of a village called Taungdwin just as dawn was breaking. Here the girl espied two wood-cutters, when she yelled for help, and the two men came and took the party to their village *thugyi*, who sent them to the Dayegaung police station.

The girl Ma Hlaing appears before the Court with both her wrists cut with rope marks; the skin was actually cut in several places and a scar had formed. There can be no doubt as regards the treatment she received in the cart from the second and third accused.

The evidence of the girl is corroborated by the two wood-cutters, and I have no hesitation in believing her evidence. The girl behaved in a plucky way and gave her evidence in a very straightforward manner.

The accused are charged with kidnapping under section 366, Indian Penal Code, with intent to compel Ma Hlaing to marry against her will.

It is to be noted that Ma Hlaing is a girl over 18 years of age.

In defence the accused Maung Ku wishes it to be believed that the girl Ma Hlaing was willing to marry the second accused Maung Po Kyôk, and that it was with her own will she accompanied the family to be made over to Po Kyôk, and that she knew what was going to happen.

Now this defence is absurd. It was a well-known fact that the girl was in love with the man Po So, and would not, under any circumstances, have agreed to marry second accused, Po Kyôk.

If, as it is alleged by the defence, the girl was willing, what reason was there for the whole family with two small children to start off at an unusually early hour in the morning? All the parties live in Dayegaung, and if the girl was willing to take Po Kyôk, as it is alleged, the marriage festivities would have taken place at Dayegaung.

The witnesses Ma Man Thaw, Maung Po Tu, and Maung Kan Tha, wife and sons of first accused, are evidently lying in favour of their father, first accused. If the marriage was to have taken place at Gyi-gyi Padaung in an open way and according to custom, why should the family of the girl and the father and mother of second and third accused, stay behind in Dayegaung?

Penal Code—366.

The conduct of all the accused is quite inconsistent with honourable and open Burmese marriage customs, and therefore goes to support the evidence of complainant.

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Taking the whole evidence, I have no doubt that the father Maung Ku, first accused, disapproving of his daughter's attachment to Maung Po So, determined by deceit to force the girl to marry the son of his friend Maung Shwe Bo, namely, second accused Maung Po Kyôk, and there is no doubt that the method described by the girl is true. The conduct of the father in trying to force the girl to take Maung Po Kyôk was disgraceful, and if the two brothers, second and third accused, had, on the dark night ride in a lonely cart, offered violence to the girl the father would have been equally guilty with them, as he deceitfully placed his daughter in the power of these two ruffians.

Altogether it is a bad case. Here we have a father secretly abducting his daughter with intent that she should be married against her will to a man whom she dislikes, and who, with the help of his brother, takes part in the abduction; who, in order to carry out their intent, maltreat the girl and injure her with the result that she shows signs of the injury weeks after.

The Court finds the accused all equally guilty of the offence specified in the charge, and the Court sentences the accused Nga Ku and the accused Nga Po Kyôk and Nga Po Tôk to suffer two years' rigorous imprisonment, and, in addition, Nga Ku to pay a fine of Rs. 100, or in default to suffer rigorous imprisonment for two years; and Nga Po Kyôk and Nga Po Tôk each to pay fine of Rs. 50, or in default to suffer rigorous imprisonment for a period of two years.

They preferred an appeal to the Court of Session, which was rejected, and they have now made an application in revision.

There has been some question raised as to the credibility and sufficiency of the evidence, but it has not been much pressed.

The story of the prosecutrix is supported in the main points, especially by the testimony of the two wood-cutters and the *thugyi*, and there is no good ground for challenging the substantial accuracy of the findings of the District Magistrate. There is no room for reasonable doubt that the three accused were jointly concerned in a conspiracy for the purpose of conveying prosecutrix away and compelling her to become the bride of the accused Po Kyôk, whether she were willing or not.

As to the legal aspect of the matter, it has been argued that prosecutrix, being under twenty years of age, was still under the guardianship or control of her father, accused Maung Ku, in respect of her marriage, as laid down in the *Manugyè Dhammathat*, Chapter VI, 21—23, and the *Wunnana* 133, 134, and reference has been made to the case of *R. I. v. Ne U*,* where the Special Court of Lower Burma held that this rule of Buddhist law was applicable in a prosecution under section 366, Penal Code.

The question decided in that case, however, was merely as to the necessity for the guardian's consent, and the decision has no relevancy to the present circumstances.

The District Magistrate has convicted of kidnapping, but that is obviously wrong, as the definition of kidnapping in section 361, Penal Code, requires that the age of the female taken away should be under 16 years, whereas the prosecutrix is 18 years old.

* S. J., L. B., p. 202.

Penal Code—366.

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According to the Majority Act, 1875, 18 is the age of majority. Section 2 of that Act leaves the personal law of everyone unaffected in regard to capacity to act in the matter of marriage, but this is not a matter of marriage, though connected with that subject, but a matter of personal rights under the Criminal law. The Criminal law treats a person above the age of 18 as having attained majority—see section 87, Penal Code. But even a minor cannot be forced into a marriage against her will.

The definition of abduction in section 362, Penal Code, makes no exception with respect to minors. It merely says: "Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person." Here the father used the deceitful means, and the other accused supplemented them by the employment of force.

The prosecutrix was entitled to go on living as she was doing in her father's household, so long as he permitted her to do so, and she was entitled to protection against a forcible or deceitful removal from her position. Her father might, of course, have turned her out of his house, but he was not at liberty to employ the means he did for the purpose of getting her married to the man he had chosen, and she had refused as her husband.

The correctness of the conviction under section 366, Penal Code, after altering "kidnapping" into "abduction," cannot be questioned.

The only other point for consideration is the propriety of the sentence.

The District Magistrate has admitted the illegality of that portion of the sentence imposing imprisonment in default of fine as being contrary to the limitation imposed by section 33, Code of Criminal Procedure.

The limitation seems to apply to cases tried by a District Magistrate under section 30.

As to the substantive sentence it is doubtless severe, but whether it is excessive, that is unnecessarily severe, is another matter.

The determination of the right measure of punishment is often a point of great difficulty. Hard-and-fast rules cannot be laid down, but the decision must be left to discretion, and discretion has to be guided by a variety of considerations.

There is the element of vindictiveness, which cannot be left out of sight, notwithstanding what has been said by Plato on the subject. Both personal and public sentiment demand that the person who has made others suffer unjustly, should himself be made to suffer in return. This is quite distinct from the moral side of an act with which properly the Courts have nothing to do. Their concern is solely with the nature of the act viewed as a crime or breach of the law. The law indicates the gravity of the act by the maximum penalty provided for its punishment and the Courts have to judge whether the act committed falls short of the maximum degree of gravity, and, if so, by how much.

Penal Code—366.

The principal object of punishment, however, is the prevention of offences, and the measure of punishment must, consequently, vary from time to time according to the prevalence of a particular form of crime and other circumstances. An amount of severity may be very appropriate at one time which would be quite uncalled for at another.

It may generally be taken as a safe principle to follow, that punishments should be made as moderate as is consistent with the object aimed at. Punishment in excess is apt to defeat its own object, and to produce a reaction of popular feeling as experience shows. To shut a man up in prison longer than is really necessary is not only bad for the man himself, but is a useless piece of cruelty, and economically wasteful and a source of loss to the community.

The framers of the draft of the Penal Code contemplated a large reduction in the length of imprisonment which they found it necessary to recommend at first. They say: "We entertain a confident hope that it will shortly be found practicable greatly to reduce the terms of imprisonment which we propose. Where a good system of prison-discipline exists—where the criminal, without being subject to any cruel severities, is strictly restrained, regularly employed in labour not of an attractive kind, and deprived of every indulgence not necessary to his health—a year's confinement will generally prove as efficacious as confinement for two years in a gaol where the superintendence is lax, where the work exacted is light, and where the convicts find means of enjoying as many luxuries as if they were at liberty. As the intensity of the punishment is increased, its length may safely be diminished. As members of the Committee which is now employed in investigating the system followed in the goals of this country, we have had access to information which enables us to say with confidence that in this department of the administration extensive reforms are greatly needed, and may easily be made. The researches of that Committee will, we hope enable the Law Commission hereafter to prepare such a Code or prison-discipline as, without shocking the human feelings of the community, may yet be a terror to the most hardened wrong-doers. Whenever such a Code shall come into operation, we conceive that it will be advisable greatly to shorten many of the term of imprisonment which we have proposed."

On this subject Bentham says (Principles of the Penal Code Chapter VI):—

"Sixth, *economical*.—That is, punishments should have only that degree of severity absolutely necessary to answer their end. All beyond is not only so much superfluous evil, but produces a multitude of inconveniences, which intercept the ends of justice." And again, Chapter VIII: "It is cruel to expose even the guilty to useless sufferings, and such is the consequence of punishments too severe. But it is not more cruel still to leave the innocent to suffer? Such is the result of punishments too mild to be efficient."

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Penal Code---66.

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The offence committed in the present instance appears to be of a very unusual character. In the course of long experience in this country I have never come across a case like it. The repetition of such a crime seems unlikely, and the infliction of a heavy sentence as an example and deterrent is therefore not necessary apparently.

Another matter to be taken into consideration is the views and customs of the people. Their notions of parental authority, or what has been called domestic power, are no doubt founded on such rules as have been referred to above as existing in Buddhist law. The introduction of a different system of jurisprudence into this country is comparatively recent and it cannot be expected that the principles of English law and justice should yet be fully grasped generally. The evidence indicates that the difference is just beginning to be recognized.

Except as regards the prosecutrix herself, whom it was of course requisite to beguile, the proceedings of the accused were open enough, and their language and conduct go to show that they were acting with an impression on their minds that those proceedings were warranted by their relative positions and within the legitimate limits of the rights and duties attaching to their respective situations.

It is only reasonable to allow for misconceptions which there has not been time to remove. The danger of errors of the sort dealing to future breaches of the law must tend to diminish year by year, and consequently there can be little need for harshly deterrent measures.

I have thought it desirable to consider such principles of punishment at some length in the hope that the discussion may be of use generally in dealing with other cases.

The result of the above consideration seems to be to show that the punishment inflicted on the accused is of unnecessary severity.

The exact apportionment of punishment is by no means easy, but after looking at the circumstances on both sides, those that make against the accused and those that tell in their favour together, I come to the conclusion that, in the interests of justice and all other interests that ought to be taken into account, the substantive sentence may safely and properly be reduced to one of nine months' rigorous imprisonment on each of the accused.

The fines will stand, but the alternative sentence of imprisonment in default must be reduced and it will be three months' rigorous imprisonment accordingly.

The whole of the fines, *i.e.*, the sum of two hundred rupees is awarded to the prosecutrix in compensation for the injury suffered, according to the order of the District Magistrate.

Penal Code—374.

Penal Code—374.

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS *v.* NGA MYAING.

Penal Code, 374—Unlawful compulsory labour—Section 370—Slavery.

*Criminal Revision
No. 638 of
1897.
May
25th.*

In this case the accused was convicted under section 374, Penal Code, and sentenced to three months' rigorous imprisonment under the following circumstances.

One Maung Bo and his wife being unable to pay rupees ten on account of *thathameda*, the accused, the thugyi, paid that amount on their behalf, and in consideration thereof induced Maung Bo's wife to sign an instrument agreeing that her daughter should be pawned for the amount with interest, and in default of payment within a month should become the property of the accused.

The girl was accordingly made over to accused, and when she had temporarily left his house he dragged her back and forced her to work.

Quære.—Whether conviction should not have been under section 370?

THE District Magistrate has evidently convicted under section 374, Indian Penal Code, but in the warrant the section has been altered to section 370. A correct revised warrant should now be issued.

The case displays a singular survival of ancient practices in this country, and may be included in the printed reports of this Court on account of its curiosity and interest.

Not long ago a paper was read before the Society of Arts in London upon the subject of slavery in India, and the discussion which followed disclosed an extraordinary ignorance of the facts on the part of Indian Officers of the most extended service and the highest position.

It is a question whether the accused should not have been convicted under section 370, but he has been sufficiently punished, considering all the circumstances, and it is unnecessary to interfere in revision.

District Magistrate's Judgment.

THERE is little or no doubt about the facts of this case. Accused is thugyi of Kaget village, Pinlèbu township, and it appears he borrowed and paid Rs. 10 on account of *thathameda* due from Maung Bo and Mi Sin Ywe, husband and wife. The former went trading to try and obtain the money, but the accused, saying he could not wait any longer, called Mi Sin Ywe and her daughter Mi Kaing (aged 15 or 16) to his house, the *ywagaung* Maung Balu and a Maung Eik Pyu being also present. (The latter is said to be too old to attend.) He there wrote a document on a *parabaik* (Exhibit A), which he made Mi Sin Ywe sign. This document says that Mi Kaing is to be pawned to the accused on account of the Rs. 10 and interest due, and, if the money is not paid in one month, she is to become his property. A week or so after Mi Kaing, who was left in the thugyi's house, where she worked, got leave of absence to see her mother, and went and lived in one Maung Shan's house, where she had stayed before. In the evening she said that she disliked being in the accused's house and would not return when called. The accused went into the house and pulled her (she was crying) back to his, where she had to stay to work till a constable came from Pinlèbu station where Maung Shan had complained, and called her away.

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There is some doubt as to whether the accused has not doctored Exhibit A. He states that he merely employed Mi Kaing as a servant to work off the revenue due and paid by him.

The only point to be considered was whether the accused had committed an offence under section 370, Indian Penal Code, or section 374 only. As to this I am in some doubt, but looking to the fact that by the document as it now exists Mi Kaing was only "pawned" for a month, I do not think the accused can be said to have asserted an absolute right to restrain her personal liberty (*Queen v. Sikundur Bukkut*, N. W., 146) even though the document was understood to be a "deed of slavery" by the persons concerned. The whole occurrence certainly bears a very close resemblance to the slavery for debt found amongst certain tribes, but after some hesitation I doubt whether the accused, amongst the various offences he has committed in this matter, has committed one under section 370, Indian Penal Code.

There is no doubt that the offence under section 374 is a somewhat aggravated one. The accused acted throughout in a hard-hearted manner and grossly abused his authority as a thugyi.

Finding.—The Court finds that Maung Myaing, son of Nyun Mo, is guilty of the offence specified in the charge, namely, that he has committed the offence of unlawful compulsory labour, and has thereby committed an offence punishable under section 374 of the Indian Penal Code, and the Court directs that the said Maung Myaing be rigorously imprisoned therefor for three months.

Translation of Exhibit.

WHEREAS Maung Bo of Kaget village, being unable to pay *thathameda* tax for the year 1258, the thugyi has paid the same (for him) on condition that he (the said Maung Bo) shall repay him the amount within one month, with interest at the rate of Re. 1 per 10 days; the daughter (of Maung Bo) is pawned as security for the amount, and taken custody of by the thugyi; and if he (Maung Bo) should fail to repay the said amount within one month, the thugyi shall have the absolute right of employing her.

 Penal Code—379.

Penal Code—379.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. NGA SHWE MEIK.

 Criminal Revision
 No. 657 of
 1900.
 July
 2nd.

Taking of moveable property by a creditor from debtor's possession without his consent amounts to theft.

The complainant owed the accused Rs. 20, which he refused to pay. The accused thereupon seized a buffalo belonging to the complainant and took it away.

The accused was tried and convicted of theft by the Subdivisional Magistrate, but the District Magistrate was doubtful whether the conviction was correct.

Held,—that a creditor who takes moveable property of his debtor from the debtor's possession without his consent with the intention of coercing him to pay his debt commits theft.

References :—

I. L. R., 22, Cal., 669.

I. L. R., 22, Cal., 1017.

Weir (third edition), p. 233.

I. L. R., 15, Bom., 344.

I. L. R., 18, All., 88.

THE complainant owed the accused Rs. 20 and refused to pay. The accused thereupon seized a buffalo belonging to the complainant and took it away. The Subdivisional Magistrate convicted the accused of theft and sentenced him to pay a small fine. The District Magistrate in view of the ruling in *Prosonno Cumar Patra v. Uday Sant** decided by the High Court at Calcutta is doubtful whether the conviction is correct.

As regards the case cited by the District Magistrate it is sufficient to say that it was overruled in the year in which it was delivered by the Full Bench ruling in the *Queen-Empress v. Sri Churn Chungo*.† In that case it was held that a taking under circumstances similar to those in the present case constituted theft. The same view had already been taken by the Madras High Court in an anonymous case‡ by the Bombay High Court in the *Queen-Empress v. Nagappa*§ and by the High Court at Allahabad in the *Queen-Empress v. Agha Muhamad Yusuf*|| In view of this consensus of rulings, it is unnecessary for me to discuss the matter in detail. There is now no reasonable doubt that a creditor who takes moveable property of his debtor from the debtor's possession without his consent with the intention of coercing him to pay his debt commits theft.

The conviction in this case was therefore correct. The sentence was appropriate. The papers may be returned with these remarks.

* I. L. R., 22, Cal., 669.

† I. L. R., 22, Cal., 1017.

‡ Weir (third edition), p. 233.

§ I. L. R., 15, Bombay, 344.

|| I. L. R., 18, All., 88.

 Penal Code—384.

 Penal Code—384.

Before G. D. Burgess, Esq., C.S.I.

NGA PO HLAING AND ANOTHER *v.* QUEEN-EMPRESS.

Criminal Revision Penal Code, 384—Extortion—Upper Burma Village Regulation—Requisition for transport carts and coolies—Arrangement among villagers to procure exemption by contribution of settled quota in money.
 No. 386 of
 1897.
 April
 6th.

Under the provisions of the Upper Burma Village Regulation villagers are bound to meet requisitions for transport, such as carts and coolies, for public purposes. To save themselves from such demands the people sometimes agree to tax themselves by contributing so much a head, or so much in proportion to their relative means, to a fund to be employed in providing the requisite transport by a system of hire. In the present case the villagers of Gangaw had done this, giving the money subscribed to the two accused, one the transport contractor, the other the Thugyi or headman, who were in consequence convicted of extortion and sentenced under section 384, Indian Penal Code, to suffer two and four months' rigorous imprisonment respectively with a fine of Rs. 200 each. On appeal to the District Magistrate the conviction and sentences were upheld and the appeal dismissed on the ground that the money had been accepted as a motive for forbearing to enforce the orders for compelling villagers to supply transport and supplies to Government officials when required.

Held,—that there was no extortion involved in the system described above, which was a purely voluntary and perfectly legitimate bargain between the villagers and the accused, and, no offence having been committed, the conviction and sentences were quashed.

Extract from Judgment of Subdivisional Magistrate.

THE case in question came to light in this manner.

One Maung Tha Tin was appointed Officiating Thugyi of Gangaw, the old Thugyi, second accused, having been dismissed as he was implicated in a gambling case. On or about the August 1896 Maung Tha Tin petitioned the Subdivisional Officer, Gangaw, that the (Tha Tin) could not get carts and coolies when wanted for Government. The reply Tha Tin got from the villagers was that they had paid their money and were exempt. This petition led to an inquiry by the Subdivisional Officer. After this inquiry the Subdivisional Officer came to the conclusion that the offences of extortion and cheating had pretty well been established against certain persons, the two accused in this case amongst them.

* * * * *

It is shown that two meetings of the Thugyis and Luyis took place to arrange about the cart and coolie supply for Government needs for the year 1895, or the Burmese year 1257. The first meeting took place in June (*Nayon*) in Maung Po Mein's house (Head Revenue Clerk, Gangaw). At this meeting it was arranged that Gangaw was to supply the carts for the year, and the neighbouring villages the coolies. This was about all that took place at the first meeting. The second meeting took place the next day at the second accused's house (Thugyi of Gangaw) of Luyis and a few villagers. I will take the matter of supplying carts first. The first witness for the prosecution was not present at this meeting. What he knows is from hearsay. Witnesses second, third, fourth, and fifth were present and give evidence as to what took place. Witnesses second, third, and fourth state that the second accused gave them each a list of 20 houses, and that, if these householders did not wish to supply carts, a cart from each group of 20 houses, they were to pay at the rate of Rs. 3 per house in lieu of supplying carts. The

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fifth witness was very reluctant to speak out. The evidence against the second accused is clear enough. The question is, did his demanding money through the five Luyis from the villagers of 100 houses amount to extortion. The Court is of opinion that it did. Now when this demand for these five carts was made, no carts were wanted. It was an unjust demand made by the second accused. The order given by the second accused was that these five carts were to be kept aside so as to be in readiness. The second accused contends that the 100 villagers gave the money of their own consent in order to be exempt from supplying carts. The offence of extortion is committed by the wrongful obtaining of a consent. The order for these five carts was wrongful, as there was no demand for any carts when second accused demanded the carts.

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The definition of extortion is "Whoever intentionally puts any person in fear of injury, &c." Now a wide interpretation of the word "injury" must be borne in mind. The word "injury" denotes (section 44, Indian Penal Code) any harm whatever illegally caused to any person in body, mind, reputation, or property. The court is of opinion that by this demand of the second accused injury to property applies. Five carts with ten bullocks were to be set aside by the villagers for Government needs. The owners of these were thus prevented from using them, and to an agriculturist this for a year, must mean injury to his property. The witnesses for the defence state that five carts were to be set aside for Government work. The people naturally, in order to be relieved from this unjust demand, consented to pay money. This consent the second accused wants to construe as voluntarily given (သဘောတူငွေပေးသည်) There can be no doubt but that the second accused is guilty of extortion. His witnesses in no way clear him.

* * * * *

The first accused admits of having received this Rs. 300. With this money he states he bought three carts and bullocks for each; that these carts are now his own property, that he hires out these carts to Government when wanted, and that he takes the cart hire. Now here is a man who enriches himself in two ways. First he possesses three carts bought with the villagers' money and by means of these carts he again makes money by hiring them out! The Court is of opinion that the first accused is just as much guilty of extortion as the second accused. The money with which he (first accused) bought the carts was illegally obtained. He knew this full well. The carts consequently were bought by unlawful means. Wrongful gain by unlawful means of property to which the person gaining is not legally entitled (section 23, Indian Penal Code). The person who thus gains is certainly guilty of some offence. The Court therefore is of opinion that the first accused is guilty of extortion.

* * * * *

We now come to the cooly portion of the case.

At the first meeting held in Maung Po Mein's house it was arranged that the neighbouring villages were to supply coolies and at the time the second accused ordered Maung Po Sha, sixth witness for prosecution, to send two coolies daily for a month when their turn came. These two coolies were to be sent to the second accused's house in order to supply Government wants if wanted. Witness made known on his return to his villagers (Shun-hi) of the second accused's order. The villagers objected, whereupon witness with three villagers, witnesses seven, eight, and nine, reported to the second accused that the Shunshi villagers could not supply two coolies daily as they were busy with their cultivation, &c. The second accused told witnesses that, if the men would not come, they would have to pay him (second accused) Rs. 120 in order to be exempted. Witnesses went back and informed the villagers of the second accused's order. The money was collected (Rs. 120) by the villagers and paid to the second accused. Second accused admits having received this money. He has made no attempt to refute this charge. The first accused had no hand in this matter. Again at the same meeting second accused

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ordered Maung Yè Gyaw of Saingdu, thirteenth witness, to supply two coolies daily for a month at his house when their turn came round. There is no evidence to show that either of the accused ordered any money to be collected from this village. However, Rs. 30 was raised by the villagers in order to be exempted from supplying coolies. This money (Rs 30) was handed over to the first accused in second accused's house. He admits receiving this money. Again Maung Tùn Lôn, fifteenth witness, was unable to attend the meeting as he was unwell, but the following day he saw the Thugyi of Ywazè, who told witness about supplying two coolies daily for a month at second accused's house. There is no evidence to show that either of the accused ordered the villagers (Labo) to pay money in order to be exempted. At all events Rs. 14 was collected in the village and this amount given to the second accused.

This order of the second accused's that two coolies were to attend at his house daily for a month from the neighbouring villages was most unjust, to say the least of it. The villagers in order to get out of such an iniquitous demand preferred or consented to pay money not to supply these coolies. This consent the accused wants the Court to believe was given freely.

There is evidence, however, to show that the second accused did actually demand the money from the Shunshi villagers. The first accused is the second accused's brother-in-law. They are both *ex*-Thugyis of Gangaw and consequently have still a certain amount of (၆၃၀၀၀) authority. When this offence was committed the first accused was the *ex*-Thugyi and the second accused the Thugyi of Gangaw.

The amount of money taken by the first accused, as far as this case is concerned, is Rs. 330, the amount received by the second accused Rs. 134.

* * * * *

The fines are heavy, but it must be remembered that a large amount of money was collected from various villages. The total amount collected in the two years 1895 and 1896, as shown in the Gangaw Subdivisional Officer's preliminary inquiry is over Rs. 1,400.

Extract from Judgment of District Magistrate.

THE first ground of appeal is that the finding is against the weight of evidence and wrong in law.

The facts, however, in this case are perfectly clear and are practically admitted by both the accused. There can be no doubt that the second accused, who was at the time Thugyi of Gangaw, did order the villagers of Gangaw and adjacent villages to have always in readiness at Gangaw five carts and a number of coolies in case they were required by Government officials, and that he thereby induced the villagers to pay him large sums of money and that the first accused assisted him in making this unlawful demand by offering to supply carts and coolies and by accepting a portion of the money paid.

The question is whether these acts constitute an offence or not. The appellants' Advocate argues that the demands for carts and coolies was not an unlawful one, because the Subdivisional Officer had directed the second accused to have them ready. In support of this he produces an order of the Subdivisional Officer, Gangaw. This the Lower Court declined to admit, but as it has some bearing on this case it is now admitted, filed, and considered. This order, however, clearly does not authorize the Thugyi to keep waiting in readiness any carts or any coolies. It merely directs that the villages named in the list should be called on in turn (month by month as the list shows) to supply what was required. There is a vast difference between this and the order the appellants would wish it to be believed the Subdivisional Officer had issued. It would be no hardship for villages combining over 100 houses to supply requirements for a month at a time once in eight months (I am taking the list given by the appellants as genuine, though it has not

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been proved), but it would be a hardship for the same villages to keep a number of carts and men waiting day after day at Gangaw. It is therefore clear that the order issued by the second accused was not only unlawful, but that it was also one calculated to cause injury. It was the fear of this injury, that made the people pay the money. There can also be no doubt that the collection was dishonest. The fact that three carts with bullocks were purchased does not show that the accused collected the money for the good of the villagers. The carts they consider their own property and they retain their earnings. Moreover, it is shown that they did not pay villagers for supplies furnished. The transaction can be characterized as nothing more nor less than a swindle. The offence of extortion has, I think, been committed.

But even if there be a doubt about this, it is perfectly clear that an offence under section 161, Indian Penal Code, has been committed by the second accused, abetted by the first accused. It was the duty of the thugyi (second accused) under the Village Regulation to call on his villagers for transport and supplies when required by Government officials and to enforce his orders. But he accepted money as a motive for forbearing to enforce these orders. There is not, however, sufficient reason to alter the section of the Code under which the accused have been convicted.

* * * * *

I am doubtful whether it would not have been better to have charged the first accused only with the abetment of the offence. However, he is nearly related to the accused and to the Township Officer and had been formerly Thugyi and his influence no doubt helped to induce the elders to make the collections. He was clearly acting hand in glove with the second accused in this nefarious transaction.

* * * * *

Orders in Revision.

[*This case and Revision No. 387 are taken together.*]

THE conviction and sentence in both these cases must be quashed as bad in law.

There is no evidence of extortion; on the contrary the evidence could hardly be more plain and distinct as to the entire innocence of the accused of any offence, and it is somewhat astonishing to see any Court coming to a finding of guilty in the teeth of such evidence. It is still more surprising to see the finding upheld in appeal by a District Magistrate who generally displays a considerable amount of good judgment and sound sense.

The whole matter is extremely simple. The villagers of Gangaw and the surrounding hamlets are liable, like the rest of the country folk of Upper Burma, to be called upon to meet requisitions for transport (carts and coolies) for public purposes, with which they are bound to comply under the provisions of the Village Regulation. To some people such requisitions are inconvenient because they interfere with their ordinary vocations, agricultural or commercial, as the case may be; to others they are distasteful, because they are troublesome, or derogatory or otherwise contrary to their inclinations. To save themselves from such demands, therefore, the people agree to tax themselves by contributing so much a head or so much in proportion to

NGA PO HLAIN-
O,
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NEA PO HLAING ^{v.} their relative means to a fund to be employed in providing the requisite transport by a system of hire. This was exactly what was done in the present instance. A bargain was struck between the people and the thugyi, the second accused, and the first accused as transport contractors. The accused were to see that all Government requisitions were complied with, and that the contributors were not bothered for a month, or a year, or whatever period they paid enough money to cover. The bargain was an excellent one of its kind and thoroughly suited the villagers who made it. Precisely the same arrangement was made in Katha when there were heavy military operations in Wuntho, and the plan saved every one a world of trouble. To call such a system extortion is nothing less than ridiculous. It is argued that the accused kept up or professed to keep up an excessive supply of transport, but there is nothing to show that this was so. The villagers no doubt had a very shrewd idea of how much was wanted, and in the second year of the bargain they were on the alert to reduce the rate of subscription. The accused perhaps had the advantage in the transaction for the first year, but there is no blame to them for being good men of business and better at a bargain than their neighbours. Even if they overreached those dealing with them, a thing not unknown in the course of trade it is believed, their fault would be a moral and not a criminal one.

Proceedings in both cases quashed accordingly.

Both accused must be released and have the fines imposed, if paid, refunded to them.

 Penal Code—406.

Penal Code—406.

Before G. W. Shaw, Esq.

NGA HMU v. KING-EMPEROR.

Mr. C. G. S. Pillay—for applicant.

*Criminal Revision
No. 964 of
1901.
November
14th.*

Criminal breach of trust—What constitutes—Essential point—Proof of misappropriation or conversion necessary for conviction.

The accused, who was a village headman, received Rs. 31 odd from the Irrigation Engineer to pay to his villagers who had been working on some canal repairs.

The accused did not pay the money till some four months later, by which time some of the persons entitled to share in it had petitioned to the Subdivisional Magistrate. For this the accused was convicted by the Subdivisional Magistrate under section 406, Indian Penal Code, and sentenced to three months' rigorous imprisonment and fine of Rs. 30 or one month's further rigorous imprisonment. The accused never disputed his liability and there was no evidence that he used the money in any other way. According to some of the witnesses, accused had sent for the people to come to be paid but refused to pay those who came because everybody had not come.

Held—that to make out a case of criminal breach of trust, it is not sufficient to show that the money has been retained. It must also be shown that the accused disposed of it in some way other than that in which he was bound to apply it, and that he did so dishonestly.

Held also—that the mere fact that accused did not at once apply the money to the purpose for which it was intended did not amount to criminal breach of trust.

There must be some dishonest use of money to constitute the offence.

I AM of opinion that the conviction in this case cannot be sustained. The accused, who is a village headman, received Rs. 31 odd from the Irrigation Engineer to pay to his villagers who had been working on some canal repairs. The accused did not pay the money till some four months later, by which time some of the persons entitled to share in it had petitioned to the Subdivisional Officer.

For this he has been convicted by the Subdivisional Magistrate under section 406, Indian Penal Code, and sentenced to three months' rigorous imprisonment and a fine of Rs. 30 or one month's further rigorous imprisonment.

The accused never disputed his liability and there was no evidence that he used the money in any other way. According to some of the witnesses for the prosecution, accused has sent for the people to come to be paid but refused to pay those who came because everybody had not come. Only a small number of those concerned took the trouble to go to the headman when they were called. The Subdivisional Magistrate thinks it unlikely that men would refuse to take Government wages. But Burmans are not at all eager to go out of their way to get small sums of Re. 1 or Rs. 2 even from Government.

I think it is not improbable that many did not go when they were sent for.

It may be that the accused had not a good excuse for not paying those who went, but he had been instructed to "in public" so as to have witnesses and it is quite possible that he understood this to mean that all the recipients should be present together.

Penal Code—406.

GA HMU
v.
KING-EMPEROR.

But the essential point of the case is that there is no proof of misappropriation or conversion.

It has been repeatedly held by the Indian High Courts that to make out a case of criminal breach of trust it is not sufficient to show that money has been retained. It must also be shown that the accused disposed of it in some way other than that in which he was bound to apply it and that he did so dishonestly. The mere fact that accused did not at once apply the money to the purpose for which it was intended does not amount to criminal breach of trust. There must be some dishonest use of money to constitute the offence.

The Subdivisional Magistrate has assumed that because accused's father died during the time he had the money here in question in his hands, and he gave him a fine funeral, therefore he probably used this money towards the Rs. 200, which the funeral must have cost. This assumption is unwarranted and does not amount to proof of misappropriation or conversion.

I set aside the conviction and sentence and direct that the accused so far as this case is concerned be set at liberty.

 Penal Code—426.

 Penal Code—426.

Before G. W. Shaw, Esq.

KING-EMPEROR v. NGA THA ZAN.

 Criminal Revision
 No. 58 of
 1901.
 February
 21st.

Mischief—Essence of the offence of—Wrongful loss or damage—Procedure—Errors committed in.

The accused, a boy of twelve years of age, who had an ulcer on his foot, saw a buffalo on the road and got on its back and rode it till the road improved and he was rested, when he let it go, thinking it would find its way home. The Magistrate rightly enough held that there was no dishonest intention but fell into the error that the boy had committed mischief. He convicted the accused under section 426, Indian Penal Code, and sentenced him to pay a fine of Rs. 25, or in default one month's rigorous imprisonment. The Magistrate also ordered the re-payment to Government out of the fine witnesses' expenses already borne by Government and also ordered the accused to pay besides the fine "all the expenses which complainant had been put to."

Held—that the essence of the offence of mischief is that the property must be destroyed or have some change caused in it, or its situation which "destroys or diminishes its value or utility or affects it injuriously." It could not be held in the present case that the utility of the buffalo was destroyed or even diminished or that it was affected injuriously.

Held also—that there was no authority for repaying to Government out of a fine witnesses' expenses already borne by Government.

Also—that if compensation was to be awarded to the complainant the Magistrate should have stated explicitly under what section of the Code the award was made and for what purpose.

Also—that the order that the accused was to pay besides the fine "all the expenses which complainant has been put to" was illegal. Section 31 of the Court Fees Act only provides for the payment of certain particular stamp and process fees and there is no authority for ordering any of a complainant's expenses to be paid in addition to the fine.

Pointed out—that the imprisonment awarded in default of payment of fine was illegal and in contravention of section 65, Indian Penal Code.

THE conviction was altogether bad and if it had not been, the Magistrate would have exercised an unwise discretion in refusing to proceed under section 562.

The accused was a boy of twelve years of age. He had an ulcer on his foot and seeing a buffalo on the road, as he says, got on its back and rode it till the road improved and he was rested, when he let it go, thinking it would find its way home. The police were foolish enough to treat this as a case of theft and to arrest this poor child and keep him in custody and send him for trial for theft.

The Magistrate rightly enough held that there was no dishonest intention, but he went on to fall into the error that the boy had committed mischief. The buffalo had been tethered, but there is nothing to show that it was not loose when the boy saw it and took it along. Wrongful loss means loss caused by unlawful means, see the definition. Here there was no unlawful means. But the section says "wrongful loss or damage," so that this is of no consequence. The essence of the offence of mischief is that the property must be des-

Penal Code—426.

KING-EMPEROR
v.
NGA THA ZAN.

stroyed or have some change caused in it or its situation which "destroys or diminishes its value or utility, or affects it injuriously."

Here the value of the buffalo was unimpaired and it cannot be held that its utility was destroyed or even diminished, or that it was affected injuriously, because it did not find its way home and was not recovered for three days.

The loss of three days' work, the inconvenience, &c., which the Magistrate refers to may, if they were appreciably felt, be a good ground for claiming damage by civil suit.

But it is clear that no criminal offence was committed. The conviction and sentence are set aside. The fine will be refunded.

The Magistrate's order was bad in several ways besides.

There is no authority for repaying to Government out of a fine witnesses' expenses already borne by Government.

However this amounted to reducing the compensation awarded to complainant to Rs. 14-8-0 apparently. If compensation was to be awarded to complainant, the Magistrate should have stated explicitly under what section the award was made, and for what purpose.

The order that the accused was to pay, besides the fine, "all the expenses which complainant has been put to" was illegal. Section 31, Court Fees Act, only provides for the payment of certain particular stamp and process fees; and there is no other authority for ordering any of a complainant's expenses to be paid in addition to the fine.

Finally, the imprisonment awarded in default of payment of fine was illegal and in contravention of section 65, Indian Penal Code.

Penal Code—430.

Penal Code—430.

Before G. D. Burgess, Esq., C.S.I.

MAUNG SEIN AND ANOTHER v. MAUNG HMO AND TWO OTHERS.

[For the first part of this judgment, see page 103.]

Penal Code 430—Mischief by causing diminution of supply of water for agricultural purposes.

*Criminal Revision
No. 329
of 1897.
March
24th.*

To bring an act under section 430, Penal Code, it must be shown to cause, or be likely to cause, a diminution of the supply of water for agricultural purposes.

Here there was nothing of the kind. It was simply a question between the parties as to their respective rights to the use of water and the matter was distinctly of a civil character.

* * * * *

In the second place there is no call for interference. To bring an act under section 430, Penal Code, it must cause, or be likely to cause, "a diminution of the supply of water for agricultural purposes," and here there was nothing of the kind. It was simply a question between the parties as to their respective rights to the use of water. The provisions of section 430, Penal Code, are apt to be very much abused, and such abuse must be discouraged. If people want to settle their civil rights, they must go to the proper tribunals. Even if an offence could be made out technically, the true matter is distinctly of a civil and not of a criminal character.

Accordingly I refuse to admit the case to revision.

Application rejected.

 Penal Code—441, 448, 509.

 Penal Code—441, 448, 509.

Before G. W. Shaw, Esq.

KING-EMPEROR v. DHERAMAL.

Mr. H. M. Lütter, Government Prosecutor—for the Crown.

Insult—Trespass—Criminal—What amounts to.

Criminal Revision
No. 533 of
1901.
Sept.
17th.

The accused was convicted under section 509, Indian Penal Code, and sentenced to pay a fine of Rs. 15 for causing the roof of a house belonging to him which complainant occupied as his tenant, to be removed while complainant's wife, a *pardanashin* woman, was in it without giving any notice beforehand, thereby causing her to be exposed to public view.

The Magistrate assumed that accused in doing what he did had the intention of insulting her modesty and in fact intruded upon her privacy. There was nothing on the record to show that the accused intended to insult the woman's modesty.

Held—that the removal of the roof in the circumstances amounted to criminal trespass under section 441, Indian Penal Code, as it was clear that accused intended to annoy the complainant and house-trespass (section 448, Indian Penal Code) was thus established.

ACCUSED was convicted under section 509, Indian Penal Code, and fined Rs. 15 or in default seven days' rigorous imprisonment. The imprisonment ought to have been simple. The fine was paid.

What the accused did was to cause the roof of a house belonging to him, which complainant occupied as his tenant, to be removed, while complainant's wife, a *pardanashin* woman, was in it, and without giving any notice beforehand. The woman had to leave the house to be out of the way of the fragment of the roof falling in upon her, and was thus exposed to public view.

The Subdivisional Magistrate assumed that accused in doing what he did had the intention of insulting her modesty and in fact intruded upon her privacy.

It may be conceded that accused, if he did not himself intrude within the meaning of section 509, abetted the intrusion of the persons whom he employed to remove the roof.

But there is nothing on the record to show that accused intended to insult the woman's modesty. He states that he did not know she was a *pardanashin*, and that his intention was to force complainant to leave the house. He had sent a notice to complainant the day before by post requiring him to quit within five days and this was delivered after the removal of the roof.

The learned Government Prosecutor is unable to support the conviction under section 509 in view of the fact that the particular intention necessary to constitute the offence punishable by that section is not proved.

The removal of the roof in the circumstances amounted to criminal trespass under section 441, as it is clear that accused intended to annoy

Penal Code—441, 448, 509.

the complainant, and house-trespass (section 448, Indian Penal Code) was thus established.

KING-EMPEROR
v.
DEKAMAL.

But the complainant wished to compound and this being so the accused ought to have been acquitted.

I set aside the conviction and sentence under section 503, Indian Penal Code, and direct that accused be acquitted of the offence punishable under section 448 and that the fine paid be refunded.

 Penal Code—441, 452.

 Penal Code—441, 452.

Criminal Revision
No. 704 of
1901.
October
1st.

Before G. W. Shaw, Esq.

CHINKWANA, KHINTHAMA, CHINKHANNA, TWA SHA v. KING-EMPEROR.

Mr. W. Calogreedy—for applicants.

Mr. H M. Lutter, Government
 Prosecutor—for the Crown.

Criminal trespass with intention of committing an offence—Not necessary that the offence should be directed against the person in possession.

The applicants pursued the complainant into the house of one Shwe Kyi with the intention of causing hurt to him and did commit an offence falling under section 323, Indian Penal Code, by voluntarily causing hurt to complainant. The accused were convicted under section 452, Indian Penal Code. The ground for the present application was the contention that the complainant was not the person in possession and that no complaint was made by the person in possession and consequently there could be no conviction for house-trespass.

Held—that as regards the first portion of section 441, Indian Penal Code, dealing with the intention to commit an offence, it does not appear to be necessary that the offence should be directed against the person in possession.

It is sufficient that the property entered upon should be in the possession of another. For these reasons the conviction under section 452, Indian Penal Code, was good.

References :—

- I.L.R., 22 Cal., page 123.
- I.L.R., 2 All., page 465.
- I.L.R., 19 Mad., page 240.
- I.L.R., 21 Bom., page 536.

THE only question is whether the conviction under section 452, Indian Penal Code, is legal.

The applicants pursued the complainant into the house of one Shwe Kyi with the intention of causing hurt to him and did commit an offence falling under section 323, Indian Penal Code, by voluntarily causing hurt to complainant.

The ground for the present application is the contention that the complainant was not the person in possession and that no complaint was made by the person in possession and consequently there could be no conviction for house-trespass.

The cases of *Chandi Pershad v. Evans*,* *Gobind Prasad and another*,† *Queen-Empress v. Rayapadachi*,‡ are relied on. And it is urged that *Queen-Empress v. Kesnavlal Jekrishna and others*,§ is distinguishable.

The words of section (441) are :—"Whoever enters into or upon property in the possession of another with intent to commit an offence, or to intimidate, insult, or annoy any person in possession of such property, &c."

Here the intention was to commit an offence and rulings which refer to cases of intimidation, insult, or annoyance may be disregarded.

* I.L.R., 22 Cal., page 123.

† I.L.R., 2 All., page 465.

‡ I.L.R., 19 Mad., page 240.

§ I.L.R., 21 Bom., page 536.

Penal Code--441, 452.

In the Calcutta case it was held that the prosecution must show the premises to be in the possession of a complainant who could compound the offence.

CHINKWANA
v.
KING-EMPEROR.

The learned Judges who decided the Bombay case seem to me to have laid down the law correctly. They remarked that it was a general rule of law that any body can complain of a criminal offence subject to specified exceptions and referred to Chapter XV of the Criminal Procedure Code, where it is laid down under what circumstances a Magistrate can take cognizance of an offence and exceptions to the general rule are enumerated.

I note that the offence punishable by section 452, Indian Penal Code, is both cognizable and non-compoundable. It can be entertained by a competent Magistrate under section 190 (1) (a) (b) or (c), Criminal Procedure Code. As regards the first part of section 441, Indian Penal Code, dealing with the intention to commit an offence, it does not appear to be necessary that the offence should be directed against the person in possession. It is sufficient that the property entered upon should be in the possession of another. For these reasons I am of opinion that the conviction was good and dismiss the application.

 Penal Code—456.

 Penal Code—456.

Criminal Revision
No. 12 of
1900.
March
8th.
 —

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS *v.* NGA TUN BYE.

House-trespass—what constitutes—punishable with whipping only when committed in order to commit an offence punishable with whipping.

The accused, a youth of 20, came by appointment to visit a girl of 19 at night. His presence was discovered by the girl's mother and he was sentenced to whipping under section 456, Indian Penal Code.

Held—that under the circumstances there was no house-trespass.

Pointed out,—that whipping can be inflicted under section 2, sub-section (9), and sub-section (10) of the Whipping Act only when the house-trespass or house-breaking is in order to the committing of an offence punishable with whipping under that section.

THE Magistrate has written an inordinately long judgment. The case was a very simple one and might have been disposed of in half a page. The accused's proceedings were doubtless improper; but not unusual. It is clear that he had no intention of committing any offence nor had he any intent to insult, intimidate, or annoy any one. His intent was to keep an assignation with his sweetheart. I am unable to see that he committed house-trespass. All the sections about house-trespass and house-breaking must be referred back to the definition of criminal trespass in section 441, Indian Penal Code. If there is no criminal trespass there can be neither house-trespass nor house-breaking. I do not believe that the accused took a *da* with him. The explanation of this incident given by the accused and Ma Shwe Yin is probably true. But in any case it is not suggested that the accused intended or attempted to do any harm. And as he did not commit house-trespass or house-breaking he was not liable to conviction merely because he had a *da* in his hand when he was caught.

Even if the accused was rightly convicted under section 456, Indian Penal Code, the sentence of whipping was illegal. Whipping can be inflicted under section 2, sub-section (9), and sub-section (10) of the Whipping Act only when the house-trespass or house-breaking is in order to the committing of an offence punishable with whipping under that section. There is no suggestion that the accused intended to commit any such offence. It would have been otherwise if the accused had been convicted under section 458, Indian Penal Code. But in that case the Magistrate would not have had jurisdiction. The accused, though young, was not a juvenile offender within the meaning of section 5 of the Whipping Act.

Even if it had been legal the sentence would have been inappropriate. Imprisonment for one day would have met the requirements of justice.

But as I have said the conviction was altogether wrong. It is reversed. I regret that I am unable to stop the execution of the sentence.

 Penal Code—457.

 Penal Code—457.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. NGA TUN THA.

Lurking house-trespass by night, Act constituting—

The accused, a youth of 16, entered the complainant's house at night without invitation and committed acts which *prima facie* constituted an assault punishable under section 354, Indian Penal Code, on the complainant's daughter, a girl of 13.

Held,—that in the absence of anything to show that the accused entered the house by appointment and that his acts did not amount to an assault but were done with the girl's consent, he must be held liable to conviction for lurking house-trespass by night.

Pointed out,—that as the offence intended to be and actually committed was punishable with imprisonment, the conviction should have been under section 457, Indian Penal Code.

Reference:—1, U.B.R., 1897—1901, Penal Code, page 354.

This case is distinguishable from that of *Tun Bye*.^{*} In this case the accused entered the complainant's house apparently without invitation and, if the evidence is to be believed, committed an assault punishable under section 354, Indian Penal Code, on the complainant's daughter, a young girl of 13 years of age. In the absence of anything to show that the accused entered the house by appointment and that his acts did not amount to an assault but were done with the girl's consent, I think he must be held liable to conviction for lurking house-trespass by night. As the offence intended to be and actually committed was punishable with imprisonment, the conviction should have been under section 457, Indian Penal Code.

The accused was young. If he was a juvenile offender within the meaning of section 5 of the Whipping Act, I think that whipping would have been an appropriate punishment. It was unfortunate that he should be consigned to jail for six months. But unless the accused was a juvenile offender, the Magistrate had no option but to award imprisonment.

I think, however, that in consideration of the accused's age a somewhat lighter sentence might have been passed.

I reduce the sentence to one of imprisonment for the term which the accused Tun Tha has already undergone.

Criminal Revision
No. 13 of
1900.
March
28th.

^{*} Page 354.

 Penal Code—463.

 Penal Code—463.

Criminal Revision

No. 513 of

899.

June

23rd.

Before H. Adamson, Esq.

QUEEN-EMPRESS v. NGA AUNG BA.

Penal Code, 463—Forgery, what constitutes—Acting dishonestly or fraudulently.

Held—that a beat constable who writes in his note-book the signature of a head-man whose village he has not visited has not thereby committed the offence of forgery as defined in section 463, Indian Penal Code.

References:—

I. L. R., 6 All., 42.

1, U. B. R., 1892—96, page 279.

The accused, who is a beat constable, was prosecuted at the instance of the District Superintendent of Police on charges under section 29, Police Act, and 465, Indian Penal Code. As a beat constable it was his duty to visit the villages in his beat and to take in his note-book the signature of the headman on each occasion of visiting a village. The charge is that he wrote in his note-book the signature of certain headmen whose villages he had not visited. The facts are admitted. The accused was convicted by the Subdivisional Magistrate, Pakôkku, under section 465, Indian Penal Code, and sentenced to a fine of Rs. 25, or in default rigorous imprisonment for one month.

The case was reported by the District Magistrate for revision on the grounds that an offence under section 465, Indian Penal Code, is not triable by a First-class Magistrate, and that the punishment was inadequate for so serious a case as forgery.

It was pointed out to the District Magistrate that, under the new Criminal Procedure Code, the offence is triable by a First-class Magistrate, and he was asked to report his reasons for holding that the facts alleged amounted to forgery as defined in section 463, Indian Penal Code. The District Magistrate's report is as follows:—

“I think the act may be held to be forgery. A person is said to make a false document who dishonestly or fraudulently signs a document with the intention of causing it to be believed that such document was signed by some person by whom he knows that it was not signed. The word ‘fraudulently’ is not defined in the Code, and I have never been able to understand its meaning, but the word ‘dishonestly’ is defined in section 24. If wrongful gain or wrongful loss is caused to anyone, the act is done dishonestly. In this case accused was paid to perform certain duties, which included his walking to certain distant villages. He did not go to those villages, but signed the thugyi's name in order to make it appear that he did. He thereby caused wrongful loss to the public and wrongful gain to himself as he certainly would not have been allowed to draw his pay if he had admitted that he had not been to the villages. He therefore made a false document and I have already shown that by doing so he caused injury to the public, and it must be inferred that he intended to cause such injury. But whoever makes a false document with intent to cause injury to the public commits forgery. The accused therefore committed forgery.

Penal Code—463.

" Even if it is held that the act did not cause wrongful gain or loss to anyone there is still the word ' fraudulently,' which must have a different meaning from ' dishonestly.' In common parlance the two words mean much the same. The meanings cannot be altogether different ; therefore one must be either wider or narrower than the other, or they must cover the same ground. But if the meaning is narrower the word ' dishonestly ' must include the word ' fraudulently.' But that could not have been intended, for in that case the word ' fraudulently ' would be superfluous and unmeaning. It would also be superfluous and unmeaning if it covered the same ground as the word ' dishonestly.' Therefore it must cover wider ground, that is to say, acts may be fraudulent though they may not be dishonest according to the definition. Therefore it is not necessary, in order to prove that an act is fraudulent, to prove that wrongful gain or wrongful loss was caused ; the word may have that meaning in some cases, but not necessarily. But the only meaning that I can attach to the word fraudulent as commonly used without implying that wrongful gain or loss is caused, is ' deceitful.' This would appear, therefore, to be the meaning of ' fraudulent ' as used in this section. Then the act was done fraudulently, for it was certainly done with intent to deceive. Even without making the meaning so wide as that, the act was fraudulent in the ordinary sense of the word ; the word ' fraudulently ' is not defined in the Code but is demonstrably intended to have a wider meaning than ' dishonestly ' and the act should therefore be held to be fraudulent within the meaning of the section."

QUEEN-EMPRESS
v.
NGA AUNG BA.

Forgery consists in making a false document under certain circumstances, and making a false document implies that it is made dishonestly or fraudulently. Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly. Wrongful gain is gain by unlawful means of property to which the person gaining it is not legally entitled, and wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled. The District Magistrate has argued that the accused caused wrongful gain to himself as he would not have been allowed to draw his pay had it been known that he had not visited the villages concerned. Such a consequence is too remote to come under the definition. But it by no means follows that this consequence would have occurred. The accused might have been punished in some other way, *e.g.*, being subjected to fatigue duty, had it been known that he neglected to visit the villages. In such case the accused would not even as the remotest consequence have caused wrongful gain to himself. It is therefore quite clear that the element of dishonestly making the false document is wanting. It has next to be considered whether he fraudulently made the document. A person is said to do a thing fraudulently if he does that thing with intent to defraud and not otherwise. To defraud in its ordinary meaning is to deprive of a right by deception or to withhold a right by deception. The meaning of the term has been discussed in *Lim Hoe v. Queen Empress* * in which it was determined that to constitute fraud there must be some right against which it is directed or something which can be injured. Fraud is more than mere deception, which was the only element in the present case. It would therefore appear that the act done by accused

* 1, U. B. R., 1892—96, page 279.

Penal Code—463.

QUEEN-EMPRESS
v.
NGA AUNG BA.

was not done either dishonestly or fraudulently and that it does not amount to forgery.

Nor would section 167, Indian Penal Code, "Framing an incorrect document intending to cause injury to any person," apply as there was no intention to cause injury. Nor would section 218, Indian Penal Code, "Framing an incorrect record or writing with intent to save any person from legal punishment," apply, because "any person" means some person other than the public servant himself. *Queen Empress v. Gauri Shunker*.*

The facts, however, undoubtedly amount to an offence under section 29, Act V of 1861. As accused in addition to the punishment inflicted has been dismissed from the Police Force, it is unnecessary to enhance the punishment. The conviction is altered to one under section 29, Police Act, and the punishment (in order to make it legal under that section) is altered to a fine of Rs. 25, or in default rigorous imprisonment for three weeks.

* I. L. R., 6 All. 42.

 Penal Code—503.

 Penal Code—503.

Before H. Thirkell White, Esq., C. I. E.

NGA SHWE WAING AND TWO OTHERS *v.* QUEEN-EMPRESS.

Penal Code, 503—Criminal intimidation—Injury.

*Criminal Revision
No. 926.
November
3rd.*

The Magistrate found that threats of violence were used by the accused with the intention of causing alarm to the complainant.

Held,—that to constitute the offence of criminal intimidation the harm threatened must be illegal.

THE gist of the offence of criminal intimidation is that the accused threatens another with "injury." This must be construed with reference to the definition in section 44, Indian Penal Code, where "injury" is defined as harm illegally caused. If a man finds a thief in his house and threatens to cause him such harm as he is entitled to cause in the exercise of the right of private defence, he may do so with the intent to cause alarm to the thief; but he is not guilty of criminal intimidation as the harm is such as may legally be caused and is not therefore "injury" as defined in the Indian Penal Code. If it were otherwise, the absurd result would follow that, in causing harm to a thief in exercise of the right of private defence, no offence would be committed; while, in threatening to cause that harm, the offence of criminal intimidation would be committed.

In the present case, the Magistrate has found that threats of violence were used by the accused with the intention of causing alarm to the complainant. But this is not sufficient. It is necessary to hold that the violence threatened was illegal. If the accused were in peaceable possession or occupation of the field where the alleged offence was committed, and if they merely threatened to resist criminal trespass, which the complainant was, or seemed to be, about to commit, they would not be guilty of criminal intimidation, provided that they threatened no more harm than they might legally inflict in the exercise of the right of private defence. The accused were in possession, and there is nothing to show that their possession was unlawful or that the complainant had the right to dispossess them. The only question is, therefore, whether the accused threatened more harm than they were legally entitled to cause. It is in evidence that the three accused did threaten to kill or beat to death the complainant. The Magistrate apparently believes these words to have been used, but thinks that they exaggerated the intention of the accused. This may very likely be the case. But it is not a good defence to a charge of criminal intimidation that the accused said more than he meant. It is clear that the accused did threaten to cause more harm than they were entitled to cause under section 104, Indian Penal Code, even on the assumption that they had a right of private defence.

They were armed and in a position to carry out their threats. The offence of criminal intimidation seems therefore to have been committed. The sentences passed by the Magistrate are not excessive. I see no reason to interfere.

 Penal Code—504.

 Penal Code—504.

Criminal Revision
No. 760,
1897.
August
9th.
 —

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS v. MI MYE MI.

Penal Code, 504—Insult intended to provoke a breach of the peace. Essence of offence consists in the effect which it is likely to produce upon the person to whom the provocation is addressed, not upon any other person who may come to know it.

The accused in this case, the wife of a police constable, was convicted under section 504, Penal Code, and sentenced to a fine of Rs. 7 for having in the course of a quarrel with the complainant's daughter referred to the complainant, who was not present, as "white-headed Nga Win."

Held,—that the conviction was bad, no offence having been committed under the section so far as complainant was concerned.

Proceedings quashed.

References.—Mayne's Criminal Law of India, section 678; 1 U. B. R., 1892—96, page 290.

IN this case the accused and the complainant's daughter had one of those wordy brawls in which Burmese women display so much command of irritating language and such astonishing ingenuity in the invention of nettling expressions. In the exercise of her talents in this direction, accused spoke of the father of her antagonist as 'Nga' instead of 'U' Win, and as a "gray-head" or "white-head."

The father, U Win, deemed the reference to his reverend gray hair irreverent, and laid a complaint before the Magistrate, who pronounced the following decision in the matter:—

"Witnesses Mi Zin, Mi Kin, Mi Pwa Hmi and Mi Tôk depose to hearing Mi Myè Mi insult U Win, by uttering aloud these words: 'white-headed Nga Win, white-headed Mi Ôk' in a row with Mi Pwa Hmi on the 21st March 1897 at ———— at about 4 P.M. Complainant U Win heard these insulting words, but kept quiet then and brought a charge against Mi Myè Mi.

"Mi Myè Mi states she did not insult U Win with the said words. She says she only asked Mi Pwa Hmi, 'Did Maung Win and Mi Ok send you here' when she was accused by the former of being the *notoriously abusive woman*. Her witness Maung Kyan for defence deposes to hearing the utterance of *white-head* once or twice by the accused. In this country among Burmans the use of ခေါင်းဖြူ (white-head) to an old, respectable person by the young, is an insult intended to provoke a breach of peace.

"It is no doubt an insulting language. In this case the complainant is an old, respectable resident of ————, 60 years old. He is respected by most people here, and commonly addressed as U Win. The accused is 34 years old and a wife of a police-constable. She appears an irritable and abusive woman. A few days ago she was fined Rs. 10 under section 504, Indian Penal Code, for insulting a man who is a Government itinerant teacher.

"There is nothing to justify her use of ခေါင်းဖြူ (white-head) to U Win in this case. Her row with Mi Pwa Hmi should have been confined to Mi Pwa Hmi only. From the statements of witnesses in this case she appears to be the most rowdy woman in ————. I will now warn her with a fine of Rs. 7."

It appears that, although the complainant overheard what passed, he was not actually present at the squabble. This being so, the accused ought not to have been convicted under section 504 of the

 Penal Code—504.

Penal Code. Mr. Mayne in his work on the Criminal Law of India seems to state the law correctly thus: "The essence of this offence consists in the effect which it is likely to produce upon the person to whom the provocation is addressed, not upon any other person who may be present or who may come to know it."

QUEEN-EMPRESS
v.
MI MYE MI.

Of course, it may be a question of fact when there are several persons present to which of them the provocation is really addressed, but in this instance no such question arose.

The proper application of the provisions of section 504 has been pointed out in the judgment reported in *Queen-Emress v. Mi Te*.*

If the accused had been guilty, a fine of Rs. 7 on a poor woman in her position would still have been an excessive penalty for so trivial a transgression. No doubt there is the ancient case of the little children who were cursed, and torn by bears, for saying to the prophet "Go up, thou bald head," but it cannot be made a modern precedent.

The conviction and sentence are quashed.

* 1, U. B. R., 1892—96, page 290.

Penal Code.

SECTION 59. *See also* page 144.

SECTION 65. *See also* pages 220, 221, and 347.

SECTION 66. *See also* page 363.

SECTION 75. *See also* page 388.

SECTION 108. *See also* page 184.

SECTION 114. *See also* page 318.

SECTIONS 174, 225B. *See also* page 61.

SECTIONS 182, 211. *See also* page 156.

SECTIONS 182, 211, 193 *See also* page 59.

SECTIONS 193, 409. *See also* page 31.

SECTION 325. *See also* page 96.

SECTIONS 354, 376, 511. *See also* page 84.

SECTION 406. *See also* page 138.

SECTIONS 453, 456. *See also* page 139.

SECTION 504. *See also* page 67.

 Police—34.

 Police—34.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS *v.* NGA IN.

Mr. H. M. Lütter, Government Prosecutor—for the Crown.

Criminal Revision
No. 342 of
1898.
July
4th.

Police Act 34,—Imprisonment imposed under section 34 of the Police Act must be simple.

The question which arises in this case is whether a sentence of rigorous imprisonment can be imposed either substantively or in default of payment of fine under section 34 of Police Act, 1861.

Held—that imprisonment imposed substantively under section 34 of the Police Act must be simple. It follows under section 66 of the Penal Code that imprisonment in default of payment of fine under the same section must also be simple.

References—

General Clauses Act, 1868.

1897.

Upper Burma Circular No. 6 of 1893.*

No. 108 of 1895.

THE question which arises in this case is whether a sentence of rigorous imprisonment can be imposed either substantively or in default of payment of a fine under section 34 of the Police Act, 1861. In Circular No. 6 of 1893, paragraph 22, it was laid down that a "sentence of imprisonment for an offence punishable under section 34 of the Police Act must be simple as the General Clauses Act, 1868, section 1, clause 18, is not applicable to General Acts of the Governor-General in Council passed prior to 1868."*

That paragraph also included a direction as to the realization of fines under section 34 of the Police Act. When the Police Act was amended in 1895, the portion of the paragraph relating to the realization of fines became inapplicable. The whole paragraph was therefore cancelled by Circular No. 108 of 1895. The fact that the part of the paragraph which related to the kind of imprisonment which might be imposed was not affected by the amendment of the Police Act was possibly overlooked. However this may be, there is now no authoritative ruling of this Court on the point under discussion; and, owing to the cancellation of paragraph 22 of Circular No. 6 of 1893* many Magistrates seem to imagine that sentences of rigorous imprisonment can be imposed under section 34 of the Police Act.

This view is incorrect. A person convicted under the above-quoted section is liable to fine or to "imprisonment not exceeding eight days." By section 4 of the General Clauses Act, 1897, in all Acts passed after 3rd January 1868, imprisonment means either rigorous or simple imprisonment. There is no such rule of interpretation applicable to the case of Acts passed before that date. Neither section 37 of the Police Act, nor section 25 of the General Clauses Act has any bearing on the question.

* Cf. Paragraph 96, Upper Burma Courts Manual.

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The point must be decided on general principles. In section 29 of the Police Act the Legislature has specially enacted that imprisonment awarded under that section may be with or without hard labour. If it had intended the same rule to apply to cases under section 34 the intention would doubtless be distinctly expressed. A penal statute must be strictly construed and not so as to import any greater severity than is clearly indicated by its wording. The most reasonable construction of the section is that the term imprisonment means imprisonment pure and simple, without the addition of the separable adjunct of hard labour. I therefore hold that imprisonment imposed substantively under section 34 of the Police Act must be simple. Under section 66 of the Penal Code it follows that imprisonment in default of payment of a fine under that section must also be simple.

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Police—42.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. (1) NGA O, (2) NGA NET, (3) NGA YAN GÔN.

Mr. H. M. Lütter, Government Prosecutor—for the Crown.

Mr. R. C. F. Swinhoe—for respondents.

Criminal Revision:
No. 254 of
1898.
March
3rd.

Police Act 1861, 42.—The prosecutions referred to in this section are for acts done or purporting to be done by a police officer in the execution of his duty as a police officer, and not for acts done apart from the execution of his duty.

In this case the three accused, police officers, were prosecuted by order of the District Magistrate for offences falling under sections 161, 193, 196, 201, and 409, Penal Code.

At the outset of the trial before the Subdivisional Magistrate a preliminary objection was taken that the prosecution, having been instituted after a lapse of three months, was barred by section 42, Police Act. The Subdivisional Magistrate referred the objection to the District Magistrate, who held that section 42 of the Police Act applied to the case and passed an order directing the withdrawal of the prosecution, in consequence of which the accused were discharged under section 494, Code of Criminal Procedure.

In revision—

Held—that section 42 of the Police Act did not apply to the prosecution in this case and that it applied only to prosecutions for anything done, or intended to be done, under the provisions of the Police Act itself, or under the general police powers thereby given. Prosecutions to which section 42 of the Police Act referred were for acts done by a police officer, acting or purporting to act in the execution of his duty, and not for acts done apart from the execution of his duty as in the present case.

Order set aside and prosecution ordered to be resumed.

Reference:—N.-W. P. H. C. R. VII, page 237.

THIS case has been fully argued on behalf of the Government and on behalf of the accused. The facts are as follows. Maung O, a Head Constable of police, and Nga Net and Yan Gôn, police constables, were prosecuted by order of the District Magistrate for certain offences under sections 161, 193, 196, 201, and 409, Indian Penal Code. It was alleged that on 1st December 1897 the three accused, being duly authorized by a warrant issued under section 5 of Act III of 1867, entered a house said to be a common gaming-house, arrested certain persons found there, and seized certain money to the amount of about Rs. 700. The Head Constable, through the medium of the other two accused, is said to have received bribes amounting to Rs. 45 from three men and, in consideration of this, to have substituted three others for these three men as accused persons in the gaming case. Of the Rs. 700 seized, only Rs. 53-4-0 were put in as an exhibit, the rest being appropriated, it is presumed, by the Head Constable and his assistants. The Head Constable is also alleged to have falsified certain records connected with the police investigation.

The case was sent for trial before the Subdivisional Magistrate and a preliminary objection was taken at the outset that the prosecution,

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having been instituted after a lapse of more than three months, was absolutely barred by section 42 of the Police Act, 1861. The Subdivisional Magistrate, instead of deciding this point, seems to have referred it to the District Magistrate, who, holding that section 42 of the Police Act applied, passed an order directing the withdrawal of the prosecution. In accordance with this order, the Subdivisional Magistrate discharged the three accused under section 494, Criminal Procedure Code.

Two days later the District Magistrate re-considered the matter and came to the conclusion that section 42 of the Police Act did not refer to prosecutions under the Penal Code. He has therefore submitted the proceedings to this Court, with the recommendation that the order of discharge be set aside and that the case be remanded for trial on its merits.

Before dealing with the main point I note that the procedure adopted by the District and Subdivisional Magistrates was irregular. In cases of doubt or difficulty Subordinate Magistrates should of course consult the District Magistrate and may well be guided by his advice. But the District Magistrate in his judicial capacity had no power to pass an order for withdrawal of the prosecution in a case pending before another Magistrate. If he wished to pass orders in the case, his proper course was to transfer it to his own file, which he had power to do under section 528, Criminal Procedure Code. On the face of it, the order discharging the accused under section 494, Criminal Procedure Code, was bad. That section empowers a Public Prosecutor appointed by the * * * Local Government, with the consent of the Court, to withdraw from a prosecution. There is nothing on the record to show that the Public Prosecutor withdrew from this prosecution, or that the Public Prosecutor, if any, was one appointed by the Local Government.

But the main point for consideration is whether the prosecution of the three police officers is barred by section 42 of the Police Act, 1861. That section, so far as it is relevant to the present case, prescribes that—

“All * * * prosecutions against any person, * * * for anything done or intended to be done under the provisions of this Act, or under the general police powers hereby given, shall be commenced within three months after the act complained of shall have been committed, and not otherwise.

On behalf of the accused, who have been called upon to show cause why the order of discharge should not be set aside, it has been argued that anything done under a warrant is within the protection afforded by this section. If the act complained of is done by an accused person in his capacity of police officer, it is urged that the prosecution must be instituted within the prescribed period. For the Crown, it was urged that section 42 of the Police Act did not apply to cases of this kind, but only to cases in which the accused acted in excess of his authority. Otherwise, it was suggested, a police officer executing a

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warrant might commit rape or murder and would be absolved from all QUEEN-EMPRESS. consequences if the prosecutions were delayed for three months.

The only case cited in the course of the arguments is one reported in *Queen-Empress v. Hazur Mir Khan** in which it was held that section 42 applied to prosecutions by persons deeming themselves injured and not to prosecutions instituted by Government under section 29 of the Police Act. It was urged, on behalf of the accused, that all the offences for which they were prosecuted were non-cognizable and must therefore be held to be prosecutions by private complainants, in which case the above ruling would not be against the accused.

In my opinion, section 42 of the Police Act does not apply to the prosecution in the present case. It applies to anything done or intended to be done under the provisions of the Act, or under the general police powers thereby given. The general police powers or those conferred by section 23. The prosecutions to which section 42 refers or prosecutions for acts done by the police officer acting, or purporting to act, in the execution of his duty. If, for instance, in executing a warrant, a police officer committed a common assault and caused hurt, under the pretext that it was necessary to use force in the execution of his duty, it would probably be held that section 42 applied to any prosecution that might be instituted. But I cannot think that, if a police officer falsifies records, accepts bribes, or misappropriates money in his charge, he can by any stretch of language be held to be acting in the execution of his duty. In doing these acts he is not doing or intending to do any thing under the provisions of the Police Act or under his general police powers. He is doing acts quite apart from his duty, and he shall not be protected from the consequences merely because he evades detection for three months. Section 42 protects a police officer against dilatory prosecutions for acts done or purported to be done in the execution of his duty as a police officer. It does not protect him against prosecutions for acts done apart from the execution of his duty. In practice, there need be no difficulty in the application of this principle. In the present case there is no protection. The acts alleged to have been committed were not done by the accused, if done at all, in the execution of their duty, but apart from it. The fact that their commission immediately followed the execution of a warrant can make no difference.

I set aside the order of the District Magistrate, dated 28th March 1898, which, so far as it purports to be a judicial proceeding, is clearly irregular, and under section 437, Criminal Procedure Code, I direct the District Magistrate, either by himself, or by some Magistrate duly empowered subordinate to him, to make further enquiry into the case of the three accused persons, Nga O, Nga Net, and Yan Gôn, who have been discharged. The effect of this order will be that the prosecutions of these three men will be resumed and the case against them will be inquired into on its merits.

* N.-W. P. H. C. R. VII, p. 237.

Pwes.

Pwes.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS *v.* NGA THAING.

Criminal Revision
No. 821 of
1899.
September
18th.

Pwes—Regulation of—Upper Burma Village Regulation—Upper Burma Towns Regulation.

The accused was convicted and fined under section 10 of the Dramatic Performances Act for having held a *pwe* without a license.

Pointed out—that while repealing the modifications of the Dramatic Performances Act previously in force, the Burma Laws Act, 1898, added a section (14A) to the Upper Burma Village Regulation and a section (7A) to the Upper Burma Towns Regulation to provide for the regulation of *pwes*. Persons holding *pwes* without a license are now liable to prosecution under those sections, and not under section 10 of the Dramatic Performances Act.

These cases are triable by any Magistrate.

THE District Magistrate, on the 24th June 1899, convicted the accused of having held a *pwe* without a license on the 25th April 1899, and sentenced him to a fine under section 10 of the Dramatic Performances Act.

As there seems to be some misapprehension on the subject of the law relating to the regulation of *pwes*, it will be convenient to explain it. Section 10 of the Dramatic Performances Act, 1876, as originally enacted, enable the local Government, with the sanction of the Governor-General in Council, to declare the provisions of that section to be in force in any local area. Thereafter dramatic performances may not be held in that area except under a license granted by the local Government or an officer specially empowered by it.

By section 7, clause (e) of the Upper Burma Laws Act, 1886, two paragraphs were substituted for the paragraphs containing the above provisions, and under these new paragraphs dramatic performances were placed under the control of the District Magistrate. It was held that under section 2 of the Act, offences under section 10 (as modified) could be tried only by the District Magistrate.

The Upper Burma Laws Act was repealed by the Burma Laws Act, 1898, which came into force on the 4th November 1898. By section 4 of that Act, the enactments mentioned in the first schedule are declared to be in force in Upper Burma, subject to the provisions of the Act or of any other enactment for the time being in force. The third sub-section of that section, which takes the place of section 7 sub-section (1), of the Upper Burma Laws Act, does not make any modification in the Dramatic Performances Act. That Act, except section 12, is therefore in force in Upper Burma without modification. The local Government has issued no notification under section 10 of that Act. Till such a notification is issued no offence against that section can be committed.

While repealing in effect the modifications of the Dramatic Performances Act previously in force, the Burma Laws Act added a section (14A) to the Upper Burma Village Regulation and a section (7A) to

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the Upper Burma Towns Regulation to provide for the regulation of *pwès*. Persons holding *pwès* without a license are now liable to prosecution under those sections not under section 10 of the Dramatic Performances Act. Offences under those sections are triable by any Magistrate.

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The conviction in the present case is altered to one under section 14A of the Upper Burma Village Regulation. No further interference is necessary.

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Pwes.

Before G. W. Shaw, Esq.

Criminal Revision
No. 870 of
1902.
November
12th.

KING-EMPEROR v.

- (1) NGA NYUN BU.
- (2) NGA SO E.
- (3) YAN SHIN.
- (4) NGA HNAN.
- (5) NGA O TAW.
- (6) NGA PE.

Mr. H. M. Lütter, Government Prosecutor — for the Crown.

“Pwe” includes any public festival or entertainment which causes an assemblage.

The accused were convicted under section 14A of the Upper Burma Village Regulation of holding or taking part in a *pwe* without a license and sentenced to nominal fines of 8 annas each. The case was referred by the Sessions Judge in order that the legality of the conviction might be decided.

The *pwe* which the accused were convicted of taking part in was a pony-race *pwe*. There was a crowd of people, a bazaar was held, pony-races were run and betting was carried on. The Sessions Judge reported that the races in question were forbidden in consequence of an affray in which a man was killed.

The question was whether the word *pwe* as used in the Upper Burma Village Regulation meant merely “dramatic performances” or included something more.

Held,—that whether construed in its popular meaning or by the light of the legislative intention, the word *pwe* is not to be understood as a mere synonym for dramatic performance, but that it includes any public festival or entertainment which causes an assemblage.

References :—

B. L. R., Volume VII, Part VI, page 227.

1, U. B. R., 1897—1901, page 368.

L. L. R., 22 Cal., page 788.

Maxwell on the Interpretation on Statutes, pages 26, 77 and 385.

The accused above named have been convicted under section 14A of the Upper Burma Village Regulation of holding or taking part in a *pwe* without a license and sentenced to nominal fines of 8 annas each, which have been paid. The case has been referred by the Sessions Judge in order that the legality of the conviction may be decided.

The *pwe* which the accused were convicted of taking part in was a pony-race *pwe* and it has been recently held by the Chief Court of Lower Burma that by the word *pwe* in the Lower Burma Towns and Village Acts, the provisions of which are identical with those of the corresponding Upper Burma Regulations in this respect, is to be understood merely an entertainment of a theatrical natural (*zat-pwe*, *yokthe-pwe*). If this is correct no license is required for holding or taking part in a pony-race *pwe* and the convictions were bad.

The point has not been decided in Upper Burma and it is necessary that the doubt should be removed. The Sessions Judge reports that the races in question were forbidden in consequence of an affray in which a man was killed.

The persons convicted have not been represented by an Advocate, but the arguments against the legality of the conviction are set out in

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the judgment of the learned Judges, who formed the majority of the Court in the Lower Burma case referred to, namely, *The Crown v. Tha Dun and Po Nyan*.*

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In support of the contrary view the Government Prosecutor has been heard. The history of the changes in the law has been succinctly given in *Queen-Empress v. Nga Taing*.† Until the passing of the Burma Laws Act, 1898, dramatic performances in Upper Burma were, by virtue of specially enacted paragraphs of the Dramatic Performances Act, placed under the control of the District Magistrate. The Burma Laws Act of 1898 repealed these special paragraphs and simultaneously added section 14 (A) to the Upper Burma Village Regulation and section 7 (A) to the Upper Burma Towns Regulation. The changes effected by this alteration of the law were two, (1) *pwè* was substituted for "dramatic performance," (2) the offence of holding a *pwè*, &c., was made triable by any Magistrate instead of by the District Magistrate.

The learned Government Prosecutor has referred to the speech of the member who introduced the bill in the Legislative Council with a view to show what the legislature understood by *pwè* at the time the bill was introduced and what the intention of the legislature was. But I do not think I am at liberty to refer to the proceedings of the legislature. The ruling of the Privy Council in the *Administrator-General of Bengal v. Prem Lal Mullick*‡ seems to be conclusive on this point.

The intention of the legislature must be gathered from the circumstances

It cannot be doubted that the intention of the provisions relating to dramatic performances was to give local officers control over such public gatherings with a view to the prevention of crime. And the inference which I think should be drawn from the changes referred to above is that the legislature intended to widen the scope of the law and strengthen the District officer's hand. With this object cases were made triable by any Magistrate and language was used which covered not only dramatic performances but other public gatherings as well. If the intention had been merely to re-enact the law about dramatic performances the abandonment of the English words "dramatic performance" for the foreign word *pwè* is not to be accounted for on any reasonable hypothesis. The legislature must be assumed to have had a purpose in making this change. The assemblage of crowds of people at *boat-race pwès*, *cart-race pwès* *nat-pwès* and such like calls for regulation and control as much as at dramatic performances. It is reasonable to suppose that the purpose of the legislature was to give control over such gathering. So far, therefore, as the intention of the legislature goes, I think there can be no doubt.

It remains to enquire whether that intention was successfully carried out; in other words whether the word *pwè* as used in the Regulations

* B. L. R., Volume VII, Part VI, page 227.

† Page 368.

‡ I. L. R., 22 Cal., page 788.

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means merely dramatic performances or includes something more. If the word *pwè* had only one plain and obvious meaning, it would be necessary to construe it in that sense whatever the intention, but if it is commonly used in different senses, it is permissible to consider the intention. (Maxwell on Interpretation of Statutes, page 26 *et seq.*)

Again it has been held that "in dealing with matters relating to the general public statutes are presumed to use words in their popular sense, but when dealing with particular business or transaction words are presumed to be used with the particular meaning in which they are used and understood in the particular business in question, that meaning being rejected, however as soon as the judicial mind is satisfied that another is more agreeable to the object and intention." (Maxwell *ibid*, page 77.) In continuation of the passage last quoted Maxwell goes on to give an instance which appears to be apposite. An Act exempting "hospitals" from land-tax was construed as applying to all establishments popularly known by that designation and even as extending to an asylum for orphans when it appeared more consonant to the object of the Act to give it that wider meaning.

Further on, in dealing with the rule as to the strict construction of penal statutes, Maxwell says: "The rule of strict construction, however, whenever invoked comes attended with qualifications and other rules no less important. Among them is the rule that the sense of the word is to be adopted which best harmonizes with the context and promotes in the fullest manner the policy and object of the legislature. The paramount object in construing penal as well as other statutes is to ascertain the legislative intent, and the rule of strict construction is not violated by permitting the words to have their full meaning of the more extensive of two meanings when best effectuating the intention. They are, indeed frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent, or to use Lord Coke's words, to suppress the mischief and advance the remedy." (*Ibid* page 385.)

In the Privy Council case already cited the question was as to the construction of a clause framed in such general terms as to include every executor who has obtained a grant of probate under the Indian Succession Act. It was sought nevertheless to exclude the executor of a Hindu will because previous legislation had excluded him. On this their Lordships remark: "A positive enactment cannot be qualified or neutralized by indications of intention gathered from previous legislation upon the same subject." Similarly I conceive that a positive enactment framed so as to include all descriptions of *pwès* cannot be qualified or neutralized by indications of intention gathered from previous legislation in which only one or two kinds of *pwè* were dealt with.

I am unable to concur in the view taken by some of the learned Judges in the Chief Court that because the word *pwè* is used in an English Act or Regulation it is to be understood in the sense in which it is commonly understood by English-speaking persons.

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The enactments, though in English, to begin with deal with the mass of the population, which is Burmese, and they are framed on the basis of Burmese institutions and Burmese customs. If *pwè* is to be understood in its popular sense, it must be understood, in my opinion, in the sense in which it is used by the Burmese population.

That this sense is that of dramatic performances merely I do not think any one moderately acquainted with the country or people would venture to assert. The word is often used no doubt of dramatic performances, but it is quite as commonly used of other festivals or entertainments, e.g., *nat-pwè*, a form of festival known in more than one part of Upper Burma. Some quotations from the dictionary were given in the Lower Burma judgment, but others might be made which go to disprove the conclusion there drawn, e.g.—

pwè-ok, an overseer or manager of a festival ;

pwè-kan, to take part in a festival ; keep a festival ;

pwè-lok, to make a festival ;

pwè-win, to commence holding festival ;

and in any case the learned compiler of Stevenson's edition of the dictionary would be the last man to assert that the definition is in any way complete. I think that the interpretation given by the learned Chief Judge of the Chief Court was the correct one.

My conclusion is that, whether construed in its popular meaning or by the light of the legislative intention, the word *pwè* is not to be understood as a mere synonym for dramatic performance, but that it includes any public festival or entertainment which causes an assemblage. Possibly it includes gatherings which the legislature did not wish to make subject to a license. If so, it would be desirable for the legislature to define *pwè* as used in the Regulations.

In the present case there was a crowd of people, a bazaar was held, pony-races were run, and betting was carried on.

The convictions, in my opinion, were right and there is no necessity for interference.

KING-EMPEROR

v.

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Railways—133.

Railways—133.

Criminal Revision
No. 680 of
1898.
September
30th.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. { MI KIN.
 { NGA SHWE HLAING.

Railways Act—Offences under—Magistrates empowered to try—

Offences under the Railways Act cannot be tried by Magistrates of the third class.

UNDER section 133 of the Railways Act, offences under that Act cannot be tried by Magistrates of the third class. The initial mistake was made by the Subdivisional Magistrates, who referred the case to the third class Magistrate for trial. The proceedings, being entirely without jurisdiction, are void and are set aside. The fines will be refunded to the accused.

Reformatory School—8 (2), 11 (1).

Reformatory School—8 (2), 11 (1).

Before F. S. Copleston, Esq.

QUEEN-EMPRESS v. NGA PO SU.

*Reformatory Schools Act, 8 (2), 11 (1)—Magistrates specially empowered under—
Youthful offender.*

*Criminal Revision
No. 1146,
1898.
January
30th,
1899.*

The accused was ordered by the Subdivisional Magistrate to furnish security for good behaviour under section 110, Criminal Procedure Code, and in default to be rigorously imprisoned for one year. On appeal, the District Magistrate dismissed the appeal, but ordered that the accused should be confined in a reformatory and added that a "revised warrant should issue." Accordingly a revised warrant issued directing accused to be detained for one year in a reformatory school.

Held—that the order was illegal for several reasons—

Firstly—The prisoner was 16 years old and was therefore not a youthful offender as defined in the Reformatory Schools Act, not being under the age of 15.

Secondly—That the period of detention shall not be less than *three* years and the Magistrate ordered detention for *one* year.

Thirdly—The Magistrate had not been specially empowered to exercise powers under the Act.

Fourthly—The accused had not been sentenced to imprisonment within the meaning of section 8 of the Act. An order for imprisonment in default of furnishing security is not a sentence of imprisonment.

THE Subdivisional Magistrate ordered one Nga Po Su to furnish security for good behaviour under section 110, Criminal Procedure Code, and in default to be rigorously imprisoned for one year.

It appears from the record that the prisoner appealed to the District Magistrate, who dismissed the appeal, but in his order stated that the Superintendent of the jail had pointed out that the accused prisoner should be confined in a reformatory, and the District Magistrate added that "a revised warrant should be sent." Accordingly the Subdivisional Magistrate issued another warrant directing that, instead of undergoing his sentence, Nga Po Su should be detained for a period of one year in a reformatory school at Insein.

This order was illegal for several reasons. In the *first* place, so far as the record shows, the prisoner was 16 years old and was therefore not a youthful offender as defined in the Reformatory Schools Act, not being under the age of 15.

No such inquiry as is directed by section 11 (1) or (2) was made before the Magistrate's warrant was issued. Nor does it appear that the District Magistrate made any inquiry before he ordered the Subdivisional Magistrate to issue a revised warrant.

Thus the offender was not a person who could be sent to a reformatory.

Secondly, the order was illegal because section 8 (1) of the Act distinctly lays down that the period of detention shall not be less than *three* years and the Magistrate ordered detention for *one* year, ignoring at

Reformatory School—8 (2), II (1).

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the same time the rules under the Reformatory Schools Act, published under Judicial Department Notification No. 237, dated the 12th June 1897.

Thirdly, the Magistrate, as the District Magistrate has since intimated to the Superintendent of the jail, had not been specially empowered to exercise powers under this Act; therefore the order of the Subdivisional Magistrate was illegal on this ground also.

Fourthly, the offender had not been *sentenced to imprisonment* within the meaning of section 8 of the Act. An order for imprisonment in default of furnishing security is not a *sentence of imprisonment*.

Section 123 of the Criminal Procedure Code provides that, if security is not given, the person ordered to give security shall be *committed* to prison, or be *detained* in prison until the period fixed expires or security is given. I do not find that the imprisonment order under section 123 is anywhere called a sentence of imprisonment. It may be noted too that, if it were held that section 8 of the Reformatory Schools Act applied to such imprisonment, a lad who failed to give security at once and was therefore ordered to be committed to prison might instead be sent to a reformatory for any term not less than three and not more than seven years, and, so far as the Magistrate was concerned, the lad might suffer this term of detention in the reformatory, although directly after he was committed to jail he offered the required security. This would not seem a probable intention of the Legislature.

The revised order, as contained in the revised warrant of the Subdivisional Magistrate, being illegal for these above reasons, is set aside and the original order is restored. The Magistrate must recall his second warrant.

I do not understand how the District Magistrate, on the facts before him on the record of the Subdivisional Magistrate's proceedings, came to pass the orders he did regarding detention in a reformatory.

In case the District Magistrate considers it necessary to hold further inquiry into Nga Po Su's age and then finds he is under 15, and thinks that his long detention in jail is inadvisable, he has powers under section 124, Criminal Procedure Code, which may enable him to deal with the case.

Sentence.

See also pages 318 and 375.

Stamps—30, 65.

Stamps—30, 65.

Criminal Revision
No. 251 of
1897.
February
17th.

Before G. D. Burgess, Esq., C.S.I.

J. N. JOHANNES v. QUEEN-EMPRESS.

Mr. S. C. Dutta—for applicant.

Stamp Act, ss. 58 and 64†—Refusing or neglecting to give a receipt when required to do so.*

The accused had sent the complainant a stamped and receipted bill for a certain amount, and on the complainant paying a portion of the bill by cheque, declined to give a receipt for the cheque.

Held—that the accused had failed to comply with the requirements of the law and had been properly convicted under section 64† of the Stamp Act.

THE applicant-accused has been convicted under section 64† of the Stamp Act for refusing or neglecting to give a receipt when required to do so under section 58.*

The accused on the 30th June sent the complainant a bill for Rs. 115 with a revenue stamp for one anna affixed, over which he signed his name below the words "Received payment" on the printed form.

The complainant stated in his examination that he sent accused a cheque for Rs. 74 on November 3rd and asked for an acknowledgment, but accused declined to give one. The complainant's wife stated in evidence that the bill was returned to accused with a request that the date, *i.e.*, of payment apparently, might be entered. Accused admitted receiving the cheque and pleaded that the bill was not returned till December after a formal demand for a receipt had been made by a lawyer.

It is acknowledged that no receipt was furnished, and it is not material therefore what otherwise passed between the parties. The applicant-accused's learned advocate relied on the receipted bill, but he now admits that this document does not comply with the provisions of section 58* of the Stamp Act.

That section says:—

"Any person receivingany.....cheque for an amount exceeding Rs. 20shall, on demand by the person paying or delivering such.....cheque.....give a duly stamped receipt for the same."

The accused-applicant doubtless thought that he had already given a receipt, but he had not given a receipt *for the same*, that is, for the cheque, and consequently he has not complied with the requirements of the section, and has been rightly convicted under section 64.†

The offence was purely a technical one, and nothing beyond a nominal penalty was demanded. The Magistrate has passed an order for the payment of costs in addition to a fine of Rs. 5, and apparently

*[Section 30 of the Stamp Act, 1899.]

†[Section 65 of the Stamp Act, 1899.]

Stamps—30, 65.

costs besides court-fee costs have been included. All that the Magistrate was entitled to award by way of costs was the fees specified in section 31 of the Court Fees Act. The Magistrate's order must be amended in accordance with law, but in order that the complainant may be compensated for the expenses properly incurred in the prosecution, this Court directs that the whole of the fine imposed be applied in defraying those expenses under section 545 (a) of the Code of Criminal Procedure. In other respects the application for revision is rejected.

J. N. JOHANNES
CL.
QUEEN-EMERALS.

Stamps—62.

Stamps—62.

Criminal Revision
No. 531 of
1897.
September
30th.

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS v. NGA PEIN.

The accused (the obligee) had signed a document written on paper bearing a one-anna stamp, whereby the maker promised to repay to the accused or to his order a certain sum of money which he (the maker) had borrowed from the accused. The document was treated as a bond because it was attested by witnesses and the accused was convicted by the Magistrate under section 61 * of the Stamp Act for executing a bond on insufficiently stamped paper, and was sentenced to pay a fine of fifteen rupees.

Held—reversing the conviction and sentence, that the instrument, though attested by witnesses, was not a bond inasmuch as it was payable to order,—clause (b) (4) of section 3 of the Stamp Act†—and was a promissory note and duly stamped as such.

Held—also that the signature of the obligee being otherwise useless could be in no other capacity than that of a witness.

THE District Magistrate seems to be in some difficulty about answering the questions put, which I am sorry for, as it is always of much assistance to have the benefit of another opinion in matters of this kind. I am at a loss to understand the reason, but if the District Magistrate will let me know what has embarrassed him, I shall be glad to try to see that similar difficulty shall, if possible, be avoided on another occasion.

So far as I can make out, however, both the questions left for consideration ought to be answered in favour of accused. That is to say that he, being the obligee of the instrument, must have signed it merely as a witness, since his signature could have no effect in any other capacity. His signature was in fact superfluous and, except in the character of a witness, meaningless.

The second objection to the conviction is that the instrument has erroneously been treated as a bond, whereas it is in reality a promissory note and duly stamped as such. It seems to have been treated as a bond because it is attested by witnesses, on account of clause (b) (4) of section 3 of the Stamp Act.† But that clause defines an instrument whereby a person obliges himself to pay money to another as a bond when attested by a witness only where such instrument is *not* payable to order or bearer, whereas the document in this case is payable to order.

Consequently the conviction is wrong on two accounts, and, as no offence whatever has been committed, it must be quashed with the sentence.

* [Section 62 of the Stamp Act, 1899.]

† [Section 2 (5) (b) of the Stamp Act, 1899.]

Towns Regulation—6.

Towns Regulation—6.

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS v. NGA TUN U.

*Criminal Revision
No. 818 of
1897.
August
10th.*

*Towns Regulation—VI of 1891—Section 6—Neglect of duty by headman of ward
or elder of block—Duties of—Sections 4, 5(1)—Reporting offences.*

The accused in this case was found guilty under section 6 of the Upper Burma Towns Regulation and sentenced to a fine of Rs. 10 for failure as a ward headman to assist a Government officer, a police sergeant, in the execution of his duties by not reporting a case of theft as directed by the sergeant.

The District Magistrate submitted the case to the High Court for revision with the following remarks:—

“The only offences that a headman of a ward is bound to report under the Upper Burma Towns Regulation are those enumerated in section 4 of the Regulation. It is in my opinion unduly stretching the meaning of section 5 (1) (k) of the Regulation to hold that that clause applies to cases in which headmen do not report offences which under the Towns Regulation they are not bound to report.

“I am of opinion therefore that the conviction of the headman under the Towns Regulation in this case was not legal. I think, however, that a conviction of the headman of the ward might have been had under section 176 of the Indian Penal Code as a headman of a ward is apparently ‘an owner or occupier of land’ and would thus be bound under section 45 (c) of the Criminal Procedure Code to report the commission of a theft, “Section 45 of the Criminal Procedure Code not having been superseded in the Upper Burma Towns Regulation as it has been in the Upper Burma Village Regulation.

“These proceedings are accordingly submitted to the High Court in order that the order of the Magistrate convicting the accused may be amended in the light of the above remarks so as to bring it under the appropriate law.”

The convicting Magistrate made the report below in explanation—

“I must first point out that I have discovered that the accused is not the headman of a ward, but the elder of a block. He is the elder of Sagyinwa block in Sagyinwa ward, and not the headman of Sagyinwa ward. The prosecutor give his evidence in English and I think he must have said ‘*Lugyi* of Sagyinwa’ and the mistake may have occurred thus, as I notice now that the Inspector of Police in his report refers ‘to *Akwet gaungs*,’ which I remember I thought at the time to be a mistake. However, I should like to point out how I came to consider the accused’s omission to come under section 5 (1) (k) of the Upper Burma Towns Regulation, supposing him to have been a headman. As this sub-clause is rather vague I would venture to suggest that a ruling on this point would be of advantage.

“The sub-clause runs ‘generally to assist all officers of the Government..... in the execution of their public duties.’ A sergeant of police is an officer of Government, and a report of this kind would materially assist him in his duties. On the other hand, sub-clause (a) read with section (4) lays down certain specific offences which a headman is bound to report; and it may be held that as this particular offence (theft) is not mentioned therein therefore it is not incumbent on a headman to report it. I would respectfully give it as my opinion that this is not so, firstly because sub-clause (k) says ‘generally assist;’ this I take it to mean ‘assist in all lawful ways not above specified,’ and secondly because the accused was specifically asked to report all offences.

“Now, taking the accused to be an elder of a block, would he be liable under section 5, clause (2)? Assuming that my arguments with regard to sub-clause (k) above are sound, then I think he would be liable, as I consider the absence of any

Towns Regulation—6.

QUEEN-EMPRESS
v.
NGA TUN U.

evidence of a request from the headman himself to be of small importance, otherwise we should have the position that the elder would be bound to do nothing without express orders from his headman, which would be absurd, *e.g.*, the headman might not be able to be found when wanted.

"Next to consider the effect of convicting under section 5 (1) (k) instead of under section 5 (2). This I consider has caused no injustice to the accused. In a summary trial no formal charge is made. What I did was to explain shortly to the accused that he was asked to report the commission of the offence and that he failed to do so and to ask him for his defence. In a case of this sort with an uneducated man for the accused, the Court has to act as counsel for him and to give him every chance: a formal charge would be unintelligible to him. Having arrived at the facts as well as possible and heard what accused had to say, I found him guilty under section 5 (1) (k); and had I known he was an elder and not a headman, I should equally have found him guilty under section 5 (2), and I may point out that the punishment under section 6 is the same in each case.

"With regard to the District Magistrate's remarks I would point out that I should not have convicted accused for merely not reporting an offence not specified in section 4. I only did so because he failed to report the offence when specifically asked to do so: had it been an offence under section 4, there would have been no need to ask him. In my mind the gist of the offence was failure to comply with a request for assistance. I would further venture to point out that section 45, Criminal Procedure Code, cannot apply as all through it refers to certain events happening in a 'village' and the extramural part of the cantonment (in which Sagyinwa block lies) was declared to be a town by General Department Notification No. 218 of 23rd August 1894. The police sent up the case under section 176, Indian Penal Code, and I altered the charge for this very reason."

The District Magistrate forwarded this report with the observations below—

"The accused Tun U not being a headman of a ward does not even incur the obligation imposed by section 4 (1) of the Upper Burma Towns Regulation.

"It is clear that as regards offences section 4 (1) of the Towns Regulation contains all the obligations imposed on ward headmen.

"Section 5(k) applies, in my opinion, to assistance to be rendered in general matters with which the executive are concerned and has nothing whatever to do with Police or Judicial obligations.

"Had it been intended that section 5(k) should have had the wide 'interpretation' that the Cantonment Magistrate seeks to place upon it, section 4(1) would apparently not have been enacted. It is obviously useless to lay down that certain offences are to be reported by ward headman if that section is to be gone behind and a number of other offences to be dragged in and obligations to report them also foisted on to the ward headman, under the cover of section 5(k) of the Regulation.

"As regards the Judicial Commissioner's remarks on my suggestion regarding section 176 of the Indian Penal Code applying, I beg to report that I thought that a headman of a ward might be considered to be a land-owner or occupier inasmuch as he would presumably own the house in which he was living and probably also other land besides, ward headmen being generally somewhat more well to do than the majority of the dwellers in town.

"The accused not being a ward headman, however, my contention falls to the ground. I consider therefore that the conviction passed on Tun U should be quashed as being illegal."

Held—that the duties of the headman of a ward and of the elder of a block in respect of the communication of information concerning offences are all contained within the four corners of section 4 of the Towns Regulation, and those duties

Towns Regulation—6.

cannot be added to in any way except in accordance with the provisions of clause (vi), sub-section (1). The practical effect of the contention of the convicting Magistrate in this case if it were accepted would be to confer on a police officer the powers which the Legislature had expressly restricted to the Deputy Commissioner with the sanction of the Local Government.

QUEEN-EMPRESS
v.
NGA TUN U.

The matter was made still clearer by reference to the first two clauses of section 5 (1) which limited the obligations of headmen in regard to arrest and assistance to the police to the offences specified in the preceding section, so that the construction sought to be put on the last clause would be in conflict with the express language of the first two.

Conviction and sentence quashed.

THE view of the District Magistrate is plainly right. The duties of the headman of a ward and of the elder of a block in respect of the communication of information concerning offences are all laid down within the four corners of section 4 of the Towns Regulation, and these duties cannot be added to in any way except in accordance with the provisions of clause (vi) of sub-section (1).

The practical effect of the contention of the Cantonment Magistrate in this case if it were accepted would be to confer on a police officer the powers which the Legislature has expressly restricted to the Deputy Commissioner with the sanction of the local Government.

The matter is made still clearer by reference to the first two clauses of section 5 (1) which limit the obligations of a headman in regard to arrest and assistance to the police to the offences specified in the preceding section, so that the construction sought to be put on the last clause would be in conflict with the express language of the first two. The conviction and sentence must therefore be quashed.

As to the District Magistrate's suggestion about the obligations imposed on the owner or occupier of land by section 45, Code of Criminal Procedure, that section does not seem to be in force in Upper Burma at all by virtue of the enactment of section 5 of the Village Regulation.

Towns Regulation—7 (2).

Towns Regulation—7 (2)

Criminal Revision
No. 84 of
1900.
April
23rd.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. NGA MIN.

Headman of Ward—Lawful requisition by—

In order to enable him to give due information to the police of the arrival of persons of bad character in his ward, the headman issued an order to all residents of the ward to notify either to the ten-house *gaung*, the block elder, or himself, the arrival and departure of strangers. The accused received his son-in-law in his house and failed to report the fact. He was convicted under section 7 (2) of the Towns Regulation of neglecting to comply with the lawful requisition of the headman.

Held—that inhabitants of a town are punishable under the Towns Regulation only for neglect to comply with lawful requisitions. There is nothing in the Towns Regulation authorizing ward headmen to require the arrival of strangers to be reported to them, and the requisition was therefore not a lawful one.

In order to enable him to give due information to the police of the arrival of persons of bad character in his ward, the headman issued an order to all residents of the ward to notify either to the ten-house *gaung*, the block elder, or himself, the arrival and departure of strangers. The accused received his son-in-law in his house and failed to report the fact. He has been convicted under section 7, sub-section (2) of the Towns Regulation, of neglecting to comply with the lawful requisition of the headman and has been sentenced to pay a nominal fine. The District Magistrate is of opinion that "the conviction is sustainable under section 4 (1) (b), Upper Burma Towns Regulation, and runs with the provisions of General Department Circular No. 66 of 5th November 1895 (Village Regulation)." The question has been argued, but the legality of the conviction has been only faintly supported.

Section 4 of the Towns Regulation is, for the purposes of this case, identical with section 45 of the Code of Criminal Procedure as enacted by section 4 of the Upper Burma Village Regulation. If the latter section were sufficient authority for the issue of a notice or requisition by a headman requiring the arrival of all strangers to be notified to him, section 11 of the Village Regulation would be superfluous. The Legislature has omitted to insert in the Towns Regulation any section corresponding with section 11 of the Village Regulation. The obvious and necessary inference is that the obligation to report the arrival of strangers, imposed on the inhabitants of a village, is not imposed on the inhabitants of a town. Good reasons for the distinction could, if necessary, be assigned.

Inhabitants of a town are punishable only for neglect to comply with lawful requisitions. There is nothing in the Towns Regulation

Towns Regulation--7 (2)

authorizing ward headmen to require the arrival of strangers to be reported to them. The question was therefore not a lawful one and the conviction cannot be sustained.

QUEEN-EMPRESS

v.

NGA MIN.

It is reversed and the fine paid will be refunded to Nga Min.

Towns Regulation—7 (2).

Towns Regulation—7 (2).

*Before H. Thirkell White, Esq., C.i.E.*QUEEN EMPRESS *v.* RAMAZAN.*Lawful requisition by headman of ward.*

Criminal Revision
No. 86 of
1900.
April
23rd.

The accused was convicted of breaking Rule 9 of the Rules made by the Commissioner, Southern (Minbu) Division, under section 5 of the Towns Regulation. The Magistrate held that the accused was punishable under section 7, sub-section (2), of the Regulation.

Held—that, in order that a conviction may be had under section 7, sub-section (2), of the Towns Regulation, it must be shown that there has been a lawful requisition by a headman and that there has been refusal or neglect to comply with it.

THE accused, Ramazan, has been convicted of breaking Rule 9 of the Rules made under section 5 of the Towns Regulation by the Commissioner of the Southern (Minbu) Division. The Magistrate has held that he is therefore punishable under section 7, sub-section (2), of the Regulation. It is assumed throughout the judgment that the Rule forbids people to do certain acts and that the accused, having done a prohibited act, is liable to punishment. But a reference to the Rule shows that it is addressed not to the public but to the headman of the ward. A reference to the section shows that it renders punishable neglect or refusal to comply with a requisition of the headman not the breach of any specific rule. The Towns Regulation does not, like the Municipal Regulation, enable any authority to frame rules for the community and impose a penalty for breach of these rules. In order that a conviction may be had under section 7, sub-section (2), of the Towns Regulation, it must be shown that there has been a lawful requisition by a headman and that there has been refusal or neglect to comply with it. In the present case there is no evidence that there was any requisition, lawful or otherwise, of a headman. The conviction cannot therefore be maintained.

The conviction is reserved and the fine will be refunded to Ramazan.

Towns Regulation.

Section 7A. *See also page 368.*

Upper Burma Village Regulation—6.

Upper Burma Village Regulation—6.

Criminal Revision
No. 544 of
1899.
September
26th.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS *v.* NGA PO KIN AND TWO OTHERS.

Mr. H. M. Lütter, Government Prosecutor—for the Crown.

Upper Burma Village Regulation, 6—Conviction, under—by village headman—Whipping, 3, 4—Penal Code, 75.

The question for decision is whether a conviction by a village headman under section 6 of the Upper Burma Village Regulation can be taken into consideration as a previous conviction for the purposes of section 3 or section 4 of the Whipping Act, or section 75, Indian Penal Code.

Held—that a conviction under section 6 of the Upper Burma Village Regulation does not involve enhanced punishment, either under section 75, Indian Penal Code, or under section 3 or section 4 of the Whipping Act.

References.—Selected Judgments, Lower Burma, 549; Printed Judgments, Lower Burma, 378; Lower Burma Village Act, 7.

The question for decision is whether a conviction by a village headman can be taken into consideration as a previous conviction for the purposes of section 3 or section 4 of the Whipping Act, or section 75, Indian Penal Code. In charging the accused, the Magistrate quoted the last section; but that section cannot have any application in a trial before a Magistrate other than a District Magistrate. The section which should have been cited is section 3 of the Whipping Act, and the proper form of charge (form No. ^{U. B. Judl.} _{Criminal}) should have been used.

In Lower Burma, it was held by the Judicial Commissioner (Mr. Fulton) that a person duly convicted by a village headman of the offence of theft is liable, in a case of a subsequent similar offence, to be dealt with under section 75 of the Indian Penal Code.* The question was, however, reconsidered by the Special Court and the learned Judges held that the previous conviction before the village headman could not be taken into account.†

It has been pointed out by the Government Prosecutor that the wording of section 7 of the Lower Burma Village Act, under which the above rulings were given, differs from that of section 6 of the Upper Burma Village Regulation, under which the present case arises. In the Lower Burma Act, the headman sentences to "confinement." In the Upper Burma Village Regulation he sentences to "imprisonment." This difference renders inapplicable to Upper Burma one of the reasons which influenced the decision of the Special Court. But the main ground of the decision was that, although when an offender is convicted by a headman he is convicted under the Penal Code, he

* Selected Judgments, Lower Burma, 549.

† Printed Judgments, Lower Burma, 378.

Upper Burma Village Regulation—6.

is punished not under that Code, but under the Village Act. I think that the ruling of the Special Court may well be followed in this matter. If it is held that an offence tried under section 6 of the Village Regulation is punishable under that section and not under the Penal Code, it is clear that it cannot be taken into account for the purpose of section 75 of the Penal Code; for that section refers only to persons convicted of certain offences punishable under the Penal Code. As regards the application of sections 3 and 4 of the Whipping Act, the matter is not so clear. For those sections merely enact that persons previously convicted of certain offences shall be liable to whipping on further conviction of the same (or in some cases similar) offences. If the sole question is whether the sentence under section 6 of the Village Regulation is under the Penal Code or not, and if it is held that the conviction is certainly under that Code, while the punishment is under the Regulation, I find some difficulty in holding that a previous conviction may not be taken into account for the purposes of section 3 or section 4 of the Whipping Act.

QUEEN-EMPRESS
v.
NGA PO KEN.

But I think that the question may be considered on somewhat broader grounds. The jurisdiction conferred on village headmen by section 6 of the Village Regulation is of a special and summary nature. It is intended merely for the speedy trial of very petty offences without the formalities of a trial in an ordinary Court. The proceedings are not reduced to writing and the record is of the most meagre kind. I do not think it likely that the Legislature intended that a conviction under these circumstances should involve the same serious consequences as a conviction before a duly constituted Court. It would, moreover, be anomalous to hold that a conviction could not be taken into account under section 75 of the Penal Code and that it could be taken into account under the Whipping Act.

Although therefore the matter does not appear to me to be entirely free from doubt, I think it will be safer to adopt the rule deliberately enunciated in Lower Burma and to hold that a conviction under section 6 of the Village Regulation does not involve enhanced punishment either under section 75, Indian Penal Code, or under section 3 or section 4 of the Whipping Act. The Courts in Upper Burma will follow this ruling in future. In the present case, the whipping has been inflicted and I do not think formal interference is necessary.

Upper Burma Village Regulation.

Section 14A. *See also* page 368.

Whipping—2.

Whipping—2.

Before H. Thirkell White, Esq., C.I.E.

QUEEN-EMPRESS v. NGA THA SIN.

Criminal Revision
No. 1135 of
1900.
November
30th.

Sentence of fine or imprisonment in addition to whipping under section 2, Whipping Act, illegal.

The accused was convicted of theft under section 379, Indian Penal Code, and sentenced under section 2 of the Whipping Act to pay a fine of Rs. 30 and to receive 15 stripes. The Magistrate on being asked to explain why he passed a sentence of whipping *in addition* to other punishment under section 2 of the Whipping Act, reported as follows :—Whipping Act, section 2, runs “in lieu of *any* punishment to which he may for such offence be liable” not “in lieu of *all* punishment.” I therefore take it that where an offence is punishable by imprisonment *and* fine *or* either, when it is decided to inflict *both*, imprisonment and fine, whipping may be substituted for either.

Held—that if whipping is imposed under section 2 of the Whipping Act, no other punishment can be joined to it.

Reference.—I. L. R., 16 Bom., 357.

I THINK there is no doubt that if whipping is imposed under section 2 of the Whipping Act, no other punishment can be joined to it. This view was taken by the Bombay High Court in the case of *Queen-Empress v. Dagadu*,* where, as in this case the accused was sentenced to receive 15 stripes and to pay a fine. The sentence of fine was set aside. Even if it be admitted that the section is grammatically susceptible of the interpretation placed on it by the Subdivisional Magistrate, there is another reason besides those assigned by the learned judges in the case above cited why the ordinary construction should be adopted. It is clear that grammatically the section can be interpreted, as it has been usual to interpret it, to mean that under it whipping alone and no other punishment can be imposed. In the interpretation of a penal statute, though full force and effect should be given to the unmistakable meaning of the law, and though a strained construction in favour of leniency is inadmissible, yet if there is an ambiguity, it is clearly right to adopt the construction which is in favour of the accused.

The sentence of fine is therefore reversed and the fine must be refunded to the accused Tha Sin.

* I. L. R., 16 Bom., 357.

Whipping—5.

Whipping—5.

Criminal Revision
No. 725 of
1897.
August
7th.

Before G. D. Burgess, Esq., C.S.I.

QUEEN-EMPRESS *v.* NGA TAW THA AND TWO OTHERS.

The Whipping Act applies to offences under the Penal Code only.

The three accused in this case were convicted under section 18 of the Cantonment Rules, which renders punishable "any person who shall commit a nuisance "by easing himself in, or by the side of, or near to, any public road or thoroughfare "or place or by indecently exposing his person," and sentenced to receive six lashes each under section 5 of the Whipping Act as juveniles. In revision it was pointed out that the act appeared to have been committed in a private building, namely, a disused mess-house, and therefore could not constitute a public nuisance, though it might amount to a trespass. Further, the sentence was illegal as the Whipping Act applies to offences under the Penal Code only.

Convicted and sentence quashed.

References.—Penal Code, 40, Chapter III; Cantonments Act, 1880, 14; Military Police Act, 1887, 8; Railways Act, 1890, 130.

THE Cantonment Magistrate makes a gallant defence, but I am afraid he must surrender his position.

Apparently no offence was committed at all, because the act was done in a private building. So far as I know, the public are only admitted to see the Palace on sufferance, and it is in no proper sense of the word a public place. But whether it is or not, the disused mess-house was just like any other unoccupied private building by the side of a road, and any one entering it might be a trespasser, but he could not possibly commit a nuisance, that is, something publicly offensive, inside it.

The argument as to the Whipping Act also will not hold good. The language of the Act itself is clear enough to show that it is meant only to apply to offences under the Penal Code.

When whipping is to be a punishment under other enactments, special provision is made—see section 8 of the Military Police Act, 1887; section 14 of the old Cantonments Act of 1880; and section 130 of the Railways Act, which last specially refers to certain juveniles.

But besides this, the Whipping Act only applies to offenders, *i.e.*, persons who commit offences; and under section 40, Penal Code, "offence" denotes a thing made punishable by the Code, and Chapter III, relating to punishments, is not one of the portions of the Code in respect of which the definition of "offence" has been extended to things made punishable by special and local laws.

Therefore, both conviction and sentence were wrong and are quashed, and much good may it do the boys whipped.

Whipping.

Section 2 (9), (10). *See also* page 354.
Sections 3, 4. *See also* page 388.

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